Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DR. KISHAN K. KHANNA, PH.D.,
Petitioner,

v.

JEMM COMPANY; MAHESH PATEL,
Vice President of Jemm Company,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Colorado

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Due Process

Whether non- compliance by the Trial Court with the Rewritten and published rules which were admittedly revised extensively and rewritten in 1999 based on the corresponding Federal Rules of Civil Procedure, and Federal Rules of Evidence, so as to make the trials conducted by the courts free, fair and impartial, constituted denial of procedural due process by the Trial Court to the Petitioner appearing as Plaintiff pro se.

(2) Equal Protection

Whether, non- compliance by the Trial Court with the mandatory provisions of the Rewritten and published Colorado Rules of Civil Procedure and Colorado Rules of Evidence when the Trial Court and other courts followed these mandatory provisions of the rules in other cases, did not constitute denial of equal protection of laws to the Petitioner, discriminating against the Petitioner on the basis of race, color, origin or such other considerations.

PARTIES TO THE PROCEEDING

Petitioner
Dr. Kishan K. Khanna, Ph. D.

Respondents
Jemm Company,
Mahesh Patel

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(vii) Order of the Supreme Court of Colorado in Writ Petition No. 05S C 104 dated April 25, 2005 denying a writ of certiorari.

BASIS OF JURISDICTION

1. This Petition is filed under Sections 1983 and 1981 of Title 42 against deprivation of property of the Petitioner without due process and denial of equal protection of laws by the Denver City and County District Court acting under the color of state law.

2. This Court has jurisdiction under Sections 1981 and 1983 of Title 42, to review the order of the Supreme Court of the State of Colorado dated 25th April 2005, denying a writ of certiorari. A copy of the order of the Supreme Court under review is annexed as Apx. A, 1a .This Petition has been filed within 90 days of the order of the Supreme Court of the State of Colorado .

3. The Petition for a writ of certiorari before the Supreme Court of Colorado was timely filed against the order of the Court o Appeals, denying petition for rehearing on 13th January 2005 , copy annexed as Apx. B, 3a.

4. The Petition for rehearing had been timely filed against the order of the Court of Appeals affirming the order and judgment of the Trial Court dated 8th Nov. 2002, nunc pro tunc 22nd October 2002.

5. The Trial Court order dated 22nd October 2002 decreed a sum of $22,000 against the Plaintiff in his suit for recovery against the Defendants a sum of $ 23,000.00 as balance technical expert fee, thus depriving the Petitioner/ Plaintiff of property in excess $45,000 and also making him liable as an alleged fraudulent person etc. causing further loss of property rights. This makes the Petition maintainable under Section 1983 of Title 42.

6. The Petitioner relies on *Zinermon v. Burch* 110 S. Ct., 975 at 982-983:

> *"In Monroe, the this Court rejected the view that Section 1983 applies only to violations of Constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are*

torts under the State's common law. It explained that Section1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws and provide a remedy for violation of civil rights "where state law was inadequate", but also to provide a federal remedy "where the state remedy, though adequate in theory was not available in practice." 365 U.S, at 173-174 , 81 S. Ct., at 467-77.

"It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the later need not be first sought and refused before the federal one is invoked. Id., 183, 81 S. Ct., at 481.

A Plaintiff, for example may bring a Section 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common law remedies for trespass and conversion."

7. The Petitioner further relies on the *Cleveland Bd. Of Educ. v. Loudermill*, 105 S. Ct., 1487 at 1493:

"As relating to due process clause, provision that substantive rights of life, liberty and property cannot be deprived except pursuant to constitutionally adequate procedures, categories of substance and procedures are distinct; once it is determined that the due process clause applies, question remains what process is due. USCA Const. Amend 5,14.

An essential principle of due process is that a deprivation of life, liberty or property be preceded by

notices and opportunity for hearing appropriate to the nature of the case. USCA Const. Amend, 5, 14.

8. The Petitioner relies on the following judgments of the US District Courts for guidance in the matter of filing this petition for a writ of certiorari before this Court.

(i) *Henniger v. Pinellas County*, 7 F. Supp. 2d 1334.

(a) Violation of procedural due process may provide foundation for Section 1983 claim USCA Const. Amend 14; 42 USCA Section 1983.

(b) Only when the procedural remedies are denied does the constitutional violation of due process become ripe under Section 1983. USCA Cons. Amend. 14 ; 42 USCA Section 1983.

(c) Violation of procedural due process occurs only when state refuses to make available means to remedy deprivation. USCA Const. Amend 14.

(ii) *Wallace v. Bd. Of Regents of University Sys. Of GA*, 967 F. Supp. 1287 (S.D. Gs. 1997)

For claim to succeed under Section 1983, plaintiff must show that person acting under color of state law deprived him of federal or constitutional right. 42 USCA Section 1983.

Allegation of violation of procedural due process rights under Fourteenth Amendment states claim under Section 1983. USCA Const. Amend. 14; 42 USCA Section 1983.

Procedural due process violation does not occur until state fails to provide an adequate remedy. USCA Const. Amend. 14.

(iii) *Lepelletier v. F.D.I.C.* 164 F. 3d 37 (DC. Cir. 1999)

Non- compliance with state law may support Section 1983 claim alleging federal due process violation. USCA Const. Amend. 14; 42 USCA Section 1983.

When presented with due process challenge, court must determine first whether there has been deprivation of property interest and if so what process is due. USCA Amend. 5.

(iv) *Berg v. Egan*, 979 F. Supp. 330 (E. FD. Pa. 1997)

(a) Equal Protection Clause of fourteenth Amendment requires that no state shall deny to any person within its jurisdiction the equal protection of laws; therefore, similarly situated people should be treated alike. USCA Const. Amend. 14.

(c) To maintain equal protection claim when plaintiffs are not in a suspect class and no fundamental rights is involved, plaintiffs must first show that they were treated differently from others similarly situated, then prove that this different treatment was intentional discrimination; and finally must show that defendant had no rational basis for treating plaintiffs differently. USCA Const. Amend 14.

9. The Petitioner further submits that acting under the color of state law, the Trial Court denied the

Petitioner/Plaintiff equal protection of laws by not complying with the Rewritten :Laws in the case of the Plaintiff while this Trial Court and other Trial Courts comply with these rules in the case of other litigants and thus violated equal protection rights and therefore this Petition has been filed under Section 1981 of Title 42.

10. The Petitioner submits that a review of the order of the State Supreme Court is permissible only in the US Supreme Court and other US District Court and Court of US Court of Appeals cannot review the orders of the State Supreme Court.

> *Under Brooker-Feldman doctrine federal district court has no authority to review final judgments of a state court in judicial proceedings; review of such judgments may be had only in United State Supreme Court.*

11. The Petitioner submits that the trial court acted under the color of state law to deprive the Petitioner/Plaintiff, property without procedural due process. The Petitioner relies on *Berg v. Egan* 979 F. Supp. 330:

> *To establish claim under Section 1983 for violation of rights protected by due process, plaintiff must demonstrate that defendants are state actors that they deprived him of constitutionally protected liberty or property interests without due process. USCA Const. Amend 14: 42 USCA Section 1983.*

CONSTITUTIONAL PROVISIONS AND RULES

(i) US Constitution Amendment 5: Due Process: *"No person .... nor be deprived of life, liberty, or property, without due process of law"*

(ii) US Constitution Amendment 14: Due Process : " ... *nor shall any State deprive any person of life, liberty, or property without due process of law"*

(iii) US Constitution Amendment 14: Equal Protection: " ... *nor deny to any person within its jurisdiction the equal protection of the laws".*

Rule16 of Colorado Rules of Civil Procedure
Rule 26 of Colorado Rules of Civil Procedure
Rule 30 of Colorado Rules of Civil Procedure
Rule 33 of Colorado Rules of Civil Procedure
Rule 34 of Colorado Rules of Civil Procedure
Rule 404 Colorado Rules of Evidence
Rule 607 Colorado Rules of Evidence
Rule 608 Colorado Rules of Evidence
Rule 701 Colorado Rules of Evidence
Rule 702 Colorado Rules of Evidence
Rule 703 Colorado Rules of Evidence
Rule 704 Colorado Rules of Evidence
Rule 705 Colorado Rules of Evidence

STATEMENT OF THE CASE

(a) Filing of Suits 01CV 5606 & 02 CV 5947

1. The Petitioner filed suit No. 01 CV 5606 appearing pro se, in Denver City and County District Court, against Defendants for recovery of the balance amount of fees for technical services rendered to them by the Petitioner/Plaintiff in connection with the criminal case No. 01 CR 102 MR in the US District Court, Denver. The case No.01 CR 102MR against the defendants was for alleged violations of the Clean Water Act and the allegations were based on the scientific data collected during a surreptitious unsupervised experiment conducted at night and data collected by electronic instruments.

2. The Defendants filed an Answer in Case No. 01 CV 5606, the Petitioner filed a REPLY and the Trial Court issued a Case Management Order under Rule 16 (b) of Colorado Rules of Civil Procedure dated 10th May 2002, setting the trial date of 21st October 2002. A copy of the Case Management Order dated 10th May 2002, is annexed as Apx. G, 27a.

3. The Plaintiff pro se, subsequently learnt that the breach of contract by the Defendants was actually instigated by the malicious intentional interference of Mr. Charles W. Elliott, the criminal attorney of the Defendants representing the Defendants in the Case No. 01 CR 102 MR. The Petitioner was constrained to file suit No. 02 CV 5947 in Denver City and County District Court against Mr. Charles W. Elliott.

4. In the case No. 01 CR 102 MR, later, the Defendants admitted to filing deliberately false reports with the Federal Government and making false statements to the Federal

Investigators and were convicted with imprisonment of one year and one day and fine of $200,000.00 on the basis of a plea bargain.

5. The Defendants filed a plea bargain largely because their criminal attorney Mr. Charles W. Elliott possessed no technical educational or other qualifications, experience or expertise, had not handled any technical case in the past, and this case required a high level of technical knowledge of issues chemical engineering, electronics, scientific analysis of longitudinal effluent data etc. The Attorney Mr. Charles W. Elliott did not engage any technical expert to assist him suitably on technical issues so as to compensate his own ignorance and lack of technical knowledge, qualifications, knowledge, experience and expertise.

(b) Violation of Mandatory Provisions of Rewritten Rule 26 (a) (2) CRCP

6. After being convicted in the criminal case No. 01 CR 102 MR, as above, the Defendants filed a motion for amendment of their ANSWER in case No. 01 CV 5606 which had been already filed nearly one year ago-obviously as an afterthought. The Trial Court approved the amendment of ANSWER on 8.19.02 very close to the Trial Date of 10.21.02 and in violation of its own Case Management Order. A copy of the order dated 8.19.02, permitting amendment of the ANSWER is annexed as Apx. F, 25a.

7. At this time, the Defendants also changed their endorsement of Mr. Charles W. Elliott as "expert witness" instead of a "lay" witness which he was earlier endorsed as, and the Trial Court granted approval of Mr. Charles W. Elliott as an "expert witness" on 8.19.02-- against the stipulations of Rule 26 (a) (2) of the Colorado Rules of Civil

Procedure which required such endorsement at least 120 days before the trial date.

8. The Trial Court further violated Rule 26 (a) (2) in the matter of filing of the affidavit of technical qualifications of the purported "expert witness" Mr. Charles W. Elliott in the matter of his alleged expertise, summary and reports, including details of the basis of his proposed "expert" witness testimony.

9. While the Trial Court permitted amendment of the ANSWER by the Defendants just a few days before the trial date, it also issued a "protective order" dated 26th Sept. 2002 in favor of the Defendants so that they were not to answer any interrogatories and make any admissions, making it impossible for the Petitioner to have any discovery from the Defendants -contrary to general rules of discovery and disclosures.

10. The main purpose of endorsing Mr. Charles W. Elliott as "expert" witness was to obtain an order from the Trial Court in Case No. 01CV 5606 in favor of Mr. Charles W. Elliott for use by him against the Petitioner/Plaintiff in case No. 02 CV 5947 as collateral estoppel.

11. Besides, while Mr. Elliott did not file the documents under Rule 26 (a) (2), and admittedly, Mr. Charles W. Elliott lacked any type of technical qualifications, experience, expertise, or experience, having not handled even one technical criminal case, and still he was designated as a "expert" witness for a technical case and on an issue which involved evaluation of highly technical study of thousands of documents requiring knowledge of chemical engineering data, instrumentation engineering data, electronics, -which are beyond the understanding of a non-technical person.

12. The only qualifications Mr. Charles W. Elliott claimed to possess was his 22 years of legal practice but that too without even a single criminal case of technical nature.

13. Thus the Case Management Order and the mandatory requirements of the Rule for Expert Witness were deliberately violated by the Trial Court to favor Mr. Charles W. Elliott and the Defendants.

14. By passing orders as late as on 19th August 2002, and 26th Sept., 2002, the Trial Court also did not permit time and opportunity to the Plaintiff specified for the rebuttal and impeachment of the proposed expert witness of the Defendants.

(c) Violation of Mandatory Provisions of Rewritten Rule 16 CRCP

15. Further since the Plaintiff appeared as a pro se party in this case, as per Rewritten Rule 16 (2) of Colorado Rules of Civil Procedure, Defendant's Attorney Mr. Bradley A. Lozow, was the designated "Responsible Attorney" and certain duties with regard to Trial Management devolved on him, but he did not carry out these duties.

16. A copy of the Rewritten Rule 16 along with that of Rules 26, 33, 34, Federal Rules of Evidence and history and philosophy of the extensive revision of the rules in 1999 is annexed as Apx. H, 34a.

17. It has been indicated in the History and Philosophy of Rule 16 of Colorado Rules of Civil Procedure that these rules were extensively amended in 1999 and Rule 16 rewritten on the basis of the revised Federal Rule of Civil Procedure and Federal Rules of Evidence.

18. It has been also noted in the History and Philosophy that these Rules were extensively amended because it was found that some attorneys indulged in "unprofessional conduct" and played games of "hide the ball" and "hard ball".

19. It has been further pointed out in the History and Philosophy that revision in 1999 was undertaken to ensure a free, fair and impartial trial especially when one of the parties is proceeding pro se.

20. In particular, as per Rule16 (f), Mr. Lozow as Responsible Attorney was supposed to file a proposed Trial Management Order not less than 30 days before the Trial date of 21st October 2002 -- that is before 21st Sept.2001, and the Trial Court was required to issue a Trial Management Order after holding the mandatory Trial Management Conference.

21. Mr. Lozow did not file any proposed Trial Management Order and thus violated a mandatory requirement of the Rewritten Rules.

22. The Trial Court also did not hold the Trial Management Conference and did not issue the Trial Management Order and this violated the mandatory requirements specially incorporated in the New Revised Rules to ensure a free, fair and impartial trial - especially when the Plaintiff was proceeding pro se.

23. As clarified in Rewritten Rule 16 (f) (3) the Trial Management Order to be issued by the Trial Court was mandatory because the plaintiff was appearing pro se. The Trial Management Order was to list the issues, witnesses, and documents etc. of both parties as per Rule 16 (f) (3).

24. The Trial court did not comply with the above mandatory requirements before conducting the trial.

25. The Trial Court did not comply with these mandatory requirements deliberately and knowingly, because this Trial Court complied with these requirements as a routine in other cases like Case No. 01 CV 3423 and 01 CV 5990.

26. Also it has been found that other Trial Courts comply with these mandatory requirements of holding Trial Management Conference and issuing a Trial Management Order in all cases.

27. On the contrary, the Trial Court denied request of the Plaintiff pro se, for holding of Trial Management Conference at the instance of the defendant's attorney who on the contrary was required to schedule Trial Management Conference.

28. Thus the Trial Court conducted the trial without complying with the mandatory requirements as per Revised Rule 16, in addition to violating the mandatory provisions of Rule 26 (a) (2).

29. Instead, the Trial Court introduced its own arbitrary procedures for the trial - only to favor the Defendants and their Attorney Mr. Charles W. Elliott.

30. The Plaintiff requested for continuance of the trial date because no trial management order was issued by the court under Rewritten Rule 16 (f) (3).

31. However, the trial court refused continuance and threatened contempt of court proceedings against the Plaintiff for disobedience of court order, if the Plaintiff pro se did not proceed with the trial.

32. Thus, in this Case No. 01 CV 5606, trial was conducted forcibly without the Plaintiff pro se being able to tender his evidence of documents and witnesses in support of his case, and to impeach and rebut the witnesses of the Defendants and their attorney Mr. Charles W. Elliott, appearing as "expert witness."

33. It is indeed very embarrassing to record that the Trial Court did engage in ex-parte communications with the Defendant's Attorney on record Mr. Bradley A Lozow, and the "expert witness" Mr. Charles W. Elliott in violation of Rules A (3) and A (4) of the Canon 3 of Colorado Rules of Judicial Conduct.

34. In absence of the evidence of witnesses and documents of the Plaintiff, the Trial Court made a quick arbitrary finding that the Plaintiff had no evidence to produce, and the Trial Court admittedly relied only upon the evidence of the defendants who were convicted as felons in Criminal Case No. 01 CR 102 MR by US District Court, and their attorney Mr. Charles W. Elliott the adversary of the Plaintiff in Case No. 02 CV 5947 who appeared as "expert witness."

35. Thus violations of the Rewritten Rules for Trial Management Conference and Trial Management Order were not accidental but deliberate and knowing in order to deprive the Plaintiff of his property under the contract.

36. Also the Trial Court followed the above arbitrary procedure in this case, differently from the procedure followed in the case of other litigants and thereby discriminated against the Plaintiff and in favor of Mr. Charles W. Elliott, on the basis of race, color, origin or such other considerations.

37. The order of the Trial Court was appealed on grounds of due process and equal protection of laws, and the Appellate Court findings are annexed as Apx. C, 5a.

(d) Confirmation of Violations of Mandatory Provisions of Rules 16 and 26 by Court of Appeals

38. In its order affirming the trial Court Judgment, the Court of Appeals found that the Trial Court did in fact violate the mandatory rules. (Court of Appeals annexed as Apx C, 13a)

39. The Appellate Court however, seems to justify the violations of the mandatory provisions of the Rules specially incorporated in the written and published Rewritten Rules revised extensively in 1999 on the basis of Federal Rules of Civil Procedure and Federal Rules of Evidence, by citing the judgment of *J.P. v District Court*, 873, P. 2d 745. (Colo.1994).

40. But this judgment advocating the discretion of Trial Court in pre-trial matters could not apply in this case because the Rewritten Rules 16 and 26, do not leave any discretion to the Trial Court in these matters.

41. In its opinion the Court of Appeals has also propounded the theory of favoring "resolution of disputes on merits" relying on the judgment in *Prefer v. PharmaNetRx, LLC*, 18 P. 3d 844. (Please see paragraph 1 of page 11 of the opinion), but the Rules have to be applied as they are written and published and not against a particular litigant.

42. The Court of Appeals also implies that the Trial Court did make a prior decision even before the trial that it will not follow the written and published Rules of Civil Procedure in

this case - because apparently according to the Trial Court and approved by the Court of Appeals - there was no merit in the Plaintiff's case.

43. The Trial Court arrived at this conclusion well before the Trial Court even heard the Plaintiff and before the Plaintiff presented any evidence before the Trial Court.

44. The Trial Court became convinced that the Plaintiff had no case, possibly because the Defendant's attorney on record Mr. Bradley A. Lozow and their Attorney in the criminal case Mr. Charles W. Elliott informed the Trial Court in their ex-parte communications with the Trial Court.

45. A Petition for rehearing was filed before the Court of Appeals but rehearing was denied by the order dated 13th January 2005, copy annexed as Apx B, 3a.

46. The matter was then represented to the Supreme Court of Colorado by way of a petition for a writ of certiorari on the issues whether the trial in Case No. 01 CV 5606 conducted by violation of several mandatory provisions of Rules 16 and 26 of Colorado Rules of Civil Procedure, was not a mistrial and whether it denied the Plaintiff due process rights under 14th Amendment of the US Constitution. (*Potashnik v. Public Service,* 247 P. 2d 137) and denied equal protection of laws to the Plaintiff.

47. This petition pointed out that the Appellate Court had already confirmed that the Trial Court did in fact violate the mandatory rules of Colorado Rules of Civil Procedure, Colorado Rules of Evidence and Colorado Rules of Judicial Conduct.

48. It was also pointed out that the Trial Court did not just ignore the Rewritten and published Rule 16, Rule 26 etc., but the Trial Court conducted the court proceedings by its own arbitrary rules - not written and not published -- and that the decision of the Appellate Court was against the decisions of the Supreme Court of Colorado that the law was to be interpreted in the plain and simple language of the law and not by giving court's esoteric interpretation. The argument of the Court of the Appeals would make the Rewritten Rules 16 and 26 ineffective and their violation would deny due process and equal protection rights under the 14th Amendment. It was pointed out that the Trial Court violated these amendments vindictively, knowingly and deliberately. (*Bill Dreiling Motor Co. v. The Court of Appeals*, 468 P.2d 37), and *Sutterfield v. The District Court*, 438 P. 2d 236.

49. The Supreme Court of Colorado denied the Petition for Certiorari without any reason. A copy of the order of the Supreme Court of Colorado denying the Writ of Certiorari is annexed as Apx. A, 1a.

50. This Petition for a writ of certiorari is filed before the US Supreme Court on the issues of due process guaranteed in the US Constitution Amends. 5 and 14. and equal protection of laws guaranteed in the US Constitution Amend 14.

REASONS FOR GRANTING THE WRIT

(a) Rewriting of Rules 16 & 26 CRCP for Free, Fair & Impartial Trials

51. As the history and background of the extensive revision of the Rules 16, 26, 30, 34 and Colorado Rules of Evidence shows, the rules for discovery, disclosures and procedure for trial management and Rules of Evidence were

admittedly revised extensively in 1999 and Rule 16 was totally rewritten to provide that when a party is appearing pro se as in the present case, the Defendants' Attorney shall be the Responsible Attorney under Rule 16 (b) and the Responsible Attorney is required to carry out specific duties under Rewritten Rule 16 (b) (2) et seq. and Rewritten Rule 16 (f) (1), and 16 (f) (3) et seq.

52. The Rewritten Rule 16 also provided specifically that when one of the parties is appearing pro se, its is mandatory that the Trial Court hold a Trial Management Conference under Rule 16 (f) (1) and issue a Trial Management Order.

53. The mandatory nature of these specific provisions of the Rewritten Rule 16 has been confirmed in the Committee Comments, which further leaves no doubt of any kind that the Trial Court has any discretion to do away with the Trial Management Conference and Trial Management Order.

54. It has been further clarified in the History and Philosophy of the extensive Revision of Rules 16 and 26 et seq. that this extensive revision was undertaken because there was:

(i) *"In the past several years, a recognition by the organized Bar of the increasing unprofessional conduct by some attorneys led to the further study of the problem in our civil justice system and new approaches to resolve them."*

(ii) *The Colorado Bar Association's Professionalism Committee made recommendations concerning improvement of Colorado' case management and discovery rules."*

(iii) *These rules have been developed to describe and to eliminate "hide-the-ball" and "hard-ball" tactics under previous Disclosure Certificate and Discovery Rules.* ***It is expected that trial judges will assertively lead the management of cases to ensure that justice is served. In the view of the Committee, abuses of the Rules, to run up fees, feed egos, bludgeon opponents into submissions, force unfair settlements, build cases for sanctions, or belittle others should not be tolerated.***

(iv) ***Rule 16 (f) (3) form of Trail Management Order.*** *The proposed Trial Management Order shall contain the following matters under the following captions and in the following order:*

I. STATEMENT OF CLAIMS AND DEFENSES : II STIPULATED FACTS: II PRETRIAL MOTIONS: IV TRIAL BRIEFS: V ITEMIZATION OF DAMAGES OR OTHER RELIEF SOUGHT: VI IDENTIFICATION OF WITNESSES AND EXHIBITS-JUROR NOTE BOOKS

(v) "Rule16 (f) (5) ***Effective Trial Management Order:*** *The Trial Management Order shall control the subsequent course of the trial. Modifications to or divergence from the Trial Management Order whether prior to or during trial shall be permitted upon a demonstration that the modification or divergence could not be with reasonable diligence have been anticipated . In the event of any ambiguity in the Trial Management Order, the Court shall interpret the Order in the manner which best advances the interests of justice."*

55. Thus the revision of Rules 16 and others was not an aimless exercise but served a very important judicial purpose of ensuring that a free, fair, and impartial trial takes place and the incidence of the "unprofessional conduct of some attorneys" be reduced.

56. These specific provisions were made mandatory as clarified in second subparagraph of the paragraph under subheading (c) of the History and Philosophy of the extensive Revision.

57. Similarly Rule 26 (a) (2) was revised to specify in detail the procedure to be adopted mandatorily by the court to endorse a person as an "expert witness" so that the concept of "expert witness" is not exploited by endorsing a spurious person as "expert witness".

58. The "expert witness" must have some proven merit -- qualifications and education, and if not at least some relevant "specialized" experience to qualify as "expert".

59. In order to ensure that a fake person is not propped up as a "expert" the rule further specifies that the proposed "expert" must file in advance an affidavit and a report or summary of his qualifications related to the "expertise" and his likely opinion and the facts and circumstances on which he bases his "expert" opinion.

60. The Rewritten Rule 26 (a) (2) also prescribes specifically a time period of 120 days before trial for a party to endorse a person as an "expert" and permits further time period to the Opposing Party to bring his own "expert" witness to impeach and rebut.

61. Needless to emphasize that it is assumed that the "expert" witness would be an honest "independent" committed professional in the field, and not a person directly involved and benefitting from his own "expert" witness evidence.

(b) Deliberate Discriminatory Violations of Mandatory Provisions by Trial Court

62. In the present case, the Trial Court permitted the Defendants to abuse the institution of "expert" witness by breaching all the above provisions of Rule 26 (a) (2) and not complying with the written mandatory provisions.

63. Further the Trial Court knowingly and deliberately permitted endorsing Mr. Charles W. Elliott, the Defendant in Suit No. 02 CV 5947 and Attorney of the Defendants as the "expert witness". This "expert" had no technical qualifications and his only qualification was that he had a "legal practice of 22 years" - but without even a single technical case during his self-claimed legal practice of 22 years.

64. Thus the following facts stand out clearly :

(i) The Defendant's Attorney as "Responsible Attorney" under Rule 16 (b) read with Rule 16 (f) was required to file a proposed Trial Management Order at least 30 days before the Trial Date of 21st October 2002, and request for a Trial Management Conference: but on the contrary he violated these provisions;

(ii) The Trial Court did not hold the mandatory Trial Management Conference and did not issue the mandatory Trial Management Order;

(iii) The Trial Court confirmed the transfer of endorsement of Mr. Charles W. Elliott from a "lay" witness status to "expert" witness status at a very late stage, on 8.19.02 with the trial fixed for 21st October 2002, in violation of his own Case Management Order and in violation of the mandatory provisions of Rule 26 (a) (2) and considerations of equity.

65. The prohibitions against such arbitrary actions were specially incorporated in the Rewritten Rules so as to ensure a free fair, and impartial trial and their violations by the Trial Court would make a mockery of the trial.

(c) Justification of Violations of Mandatory Provisions by Pre-Revision Judgments

66. In its opinion affirming the Trial Court order, the Colorado Court of Appeals has confirmed that Trial Court did in fact violate all the above important mandatory provisions of the Rewritten rules.

67. The Court of Appeals appears to justify these violations by relying on its ruling in *J. P. v. District Court*, 873 P. 2d 745, implying that the Trial Court had discretion in the matter of pretrial procedures.

68. This argument fails in this case, because the judgment *J.P. v. District Court*, supra was delivered in 1994, much before the specific rules were extensively amended and

Rewritten in 1999 leaving no discretion to the Trial Court in the matters listed above.

69. The Trial Court could not assume discretion in a matter where discretion has been specifically withdrawn from the Trial Court by a Rewritten Rule and the Trial Court cannot re-rewrite the same rule granting to himself discretion to favor a particular party.

70. The Court of appeals has advanced another argument that the Rewritten rules were deliberately violated by the Trial Court because of the judgment in the *Prefer v. PharmaNetRx, LLC*, 18 P. 3d 844 delivered in 2000: The Court of Appeals affirms that the Trial Court had already arrived at some conclusion that the Plaintiff's case had no merits - even when the Trial Court was yet to have evidence presented.

71. The Trial Court appears to have come to this conclusion on the basis of some ex-parte communications with the attorneys Mr. Bradley A. Lozow and Mr. Charles W. Elliott.

72. But this judgment *Prefer v. PharmaNetRx, LLC* , supra was also delivered before the Rewritten Rules came in to operation and therefore this judgment is not applicable to the case.

(d) Deliberate Discriminatory Violations: Issues of Due Process & Equal Protection

73. The Trial Court did use its discretion against the specific provisions of Rewritten Rule - only to favor the Defendants and their Attorney Mr. Charles W. Elliott against the Plaintiff proceeding pro se.

74. Further, the Trial Court followed these Rewritten Rules and did not violate them in other cases before it, for example 01 CV 3423 and 01 CV 5990, showing that the Trial Court was selective to cause prejudice to the Plaintiff's case for some extraneous reasons.

75. The main motive for this abuse of discretion by the Trial Court was to favor Mr. Charles W. Elliott the defendant in Case No. 02 CV 5947, with a judgment specially fashioned for use by Mr. Charles W. Elliott as a collateral estoppel in case No.02 CV 5947 against the Plaintiff pro se.

76. An important question in this case, whether the Plaintiff pro se could have brought up his witnesses and documents in view of the later orders of the court on 8/19/02 and then 9/26/02, when the trial was already fixed for 21st October 2002.

77. Whether time for litigating matter is so short that it deprives litigants of meaningful opportunity to be heard, is a due process question. USCA Const. Amend 14.
78..The Plaintiff relies on the following judgments of the Supreme Court in support of his petition:

(I) *Miller v. French*, 120 S. Ct., 2246:

"In contrast to due process, which serves principally to protected personal rights of litigants to full and fair hearing, separation of powers principles are primarily addressed to procedural concerns of protecting rule of independent judiciary within the constitutional design. USCA Const. Art. 3, Section 1 et seq.; Amend 14.

(ii) *Cleveland Bd. Of Educ. v. Loudermill*, 105 S. Ct., 1487 (1985).

"As relating to due process clause provisions that substantive rights of life, liberty and property cannot be deprived except pursuant to constitutionally adequate procedures,, categories of substance and procedure are distinct; once it is determined that the due process clause applies, question remains what process is due. USCA Const. Amends. 5,14.

" Right to a hearing under the due process clause does not depend on a demonstration of certain success. US Const. Amends. 5, 14.

(iii) *Zinermon v. Burch*, 110 S. Ct., 975 (1990).

Existence of overlapping remedies is generally irrelevant to question of existence of cause of action under Section 1983. 42 USCA Section 1983.

Existence of overlapping state remedies may be relevant, where Plaintiff's Section 1983 claim is based not on violation of rights set forth in the Bill of rights but of procedural due process. 42 USCA Section 1983; USCA Const. Amend 14.

Due Process is flexible concept that varies with particular situation. USCA Const. Amend 14.

79. As per Rule A (3) of Colorado Code of Judicial Conduct, a judge "should" be patient -- and as the commentary following the rule clarifies, he has a duty to hear fairly and with patience.

80. Further Rule A (4) provides that the Judge should "accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider "ex-parte or other communications concerning a pending case or impending proceeding."

81. It appears that in his attempt to favor somehow Mr. Charles W. Elliott, the Trial Court did not wish to follow this cannon of judicial conduct.

82. As submitted above the Trial Court did not issue any Trial Management Order and therefore there could be no compliance of Rule 16 (f) (5). Actually the Trial Court interpreted the provisions of a non-existent Trial Management Order against the Plaintiff, so as to hand over a quick judgment in favor of the Defendants in this case and in favor of Mr. Charles W. Elliott in case No. 02 CV 5947.

83. The Appellate Court has further erred in concluding about "the totality of these circumstances including the thoroughness of the pretrial proceedings ..." It is pointed out with respect that there were NO Pretrial proceedings - there is no question of "thoroughness."

84. On the other hand, the Trial Court and the Court of Appeals have not found that there were special emergencies which forced the Trial Court not to continue the trial date as requested by the Plaintiff -- especially when the Trial Court itself did not perform its mandatory duties of holding a Trial Management Conference and issuing a Trial Management Order as per Rewritten rules.

RELIEF REQUESTED BY THE PETITIONER

WHEREFORE it is humbly and respectfully prayed that the judgment and order of the Trial Court in Case No.01 CV 5606 passed on 22nd October 2002 be set aside and Case remanded for Retrial. Its is also prayed that costs be assessed against the Defendants and in favor of the Plaintiff.

Dated this 13th July 2005

Dr. Kishan K. Khanna Ph.D.
Plaintiff /Petitioner proceeding pro se

APPENDIX A

SUPREME COURT, STATE OF COLORADO
TWO EAST 14th AVENUE
DENVER, COLORADO 80203

CASE NO. 05SC104

[Dated April 25, 2005]

CERTIORARI TO THE COURT OF APPEALS,
02CA2031
DISTRICT COURT, CITY & COUNTY OF DENVER,
01CV5606

Petitioner:	)
	)
DR. KISHAN K. KHANNA,	)
	)
v.	)
	)
Respondents:	)
	)
JEMM COMPANY and MAHESH PATEL,	)
Vice President of Jemm Company.	)
	)

ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 25, 2005.

Copies mailed via the State's Mail Services Division on 04/25/05. MLK

Dr. Kishan K. Khanna
16835 E. Navarro Dr.
Aurora, CO 80013

Bradley Lozow
Lozow & Lozow
600 Stout St., Ste. 1910
Denver, CO 80202

Clerk of the Court
Colorado Court of Appeals

Clerk of the District Court
City & County Building
1437 Bannock, Rm 256
Denver, CO 80202

Honorable Robert S. Hyatt
City & County Building
1437 Bannock, Rm 256
Denver, CO 80202

APPENDIX B

COLORADO COURT OF APPEALS

No. 02CA2031

[Dated January 13, 2005]

KISHAN K. KHANNA, DR,
PLAINTIFF-APPELLANT

v.

JEMM COMPANY, MAHESH PATEL,
VICE PRESIDENT JEMM COMPANY,
DEFENDANT-APPELLEE

Appeal from the DENVER DISTRICT CIVIL COURT
Honorable ROBERT S HYATT, Judge
No. 01CV5606

ORDER DENYING PETITION FOR REHEARING

The PETITION FOR REHEARING filed in this appeal by:
KISHAN KHANNA, DR/PLAINTIFF-APPELLANT
is DENIED. DIV II

Issuance of the Mandate is stayed until: February 14, 2005

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, then the stay shall remain in effect until disposition of the cause by that Court.

By the Court:

ROTHENBERG, J.
CARPARELLI, J.
CRISWELL, J.

COPIES MAILED TO
COUNSEL OF RECORD

AND Pro Se
ON 1-13-05
BY ACG
COLORADO COURT OF APPEALS

APPENDIX C

COLORADO COURT OF APPEALS
Court of Appeals No. 02CA2031
City and County of Denver
District Court No. 01CV5606
Honorable Robert S. Hyatt, Judge

[Dated July 1, 2004]

Dr. Kishan K. Khanna	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Jemm Company and Mahesh Patel, Vice President of Jemm Company	)
	)
Defendants-Appellees.	)
	)

JUDGMENTS AFFIRMED

Division II
Opinion by JUDGE ROTHENBERG
Carparelli and Criswell*, JJ., concur

---

* Sitting by assignment of the chief Justice under provisions of Colo. Const. art. VI § 5(3), and § 24-51-1105, C.R.S. 2003.

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
July 1, 2004

Kishan K. Khanna, Pro Se

Lozow & Lozow, P.C., Bradley A. Lozow, Denver, Colorado, for Defendants-Appellees

Plaintiff, Kishan K. Khanna, appeals the judgment entered in favor of defendants, Jemm Company and Mahesh Patel after his request for a jury trial was denied, and the later Judgment awarding defendants attorney fees against him. We affirm.

In 2001, Khanna initiated this action pro se against defendants seeking to recover fees billed for "consultancy charges" and damages for slander. He alleged that: defendants were indicted in federal court for environmental crimes; he had expertise in technical data relevant to the charges; defendants hired him to review the case at the rate of $200 per hour; and he was paid $20,000 for his services, but $5,255 remained outstanding. Khanna further alleged that Patel made false statements to others which damaged his reputation.

Defendants answered, denied all material allegations, and asserted counterclaims. Defendants later moved to amend their answer and counterclaim, eliminating certain affirmative defenses and reframing the counterclaim under a fraudulent misrepresentation theory. The trial court granted the motion over Khanna's objection.

Khanna filed multiple pretrial motions and objections to the amended answer and counterclaim. He requested a continuance of the trial date, a trial setting of five days instead

of two, and the enlargement of discovery deadlines. The trial court denied all his motions.

At the commencement of the bench trial, Khanna explained to the court that a number of his witnesses were unavailable to testify that day. He presented his own testimony and the testimony of Jemm Company's representative, but called no other witnesses.

At the close of the evidence, the court entered Judgment for defendants on Khanna's claims and on their counterclaim for fraudulent inducement. The court found that: (1) no evidence supported Khanna's slander claim; (2) he agreed to perform legal, not technical, services for defendants at the rate of $200 per hour; (3) there was no written agreement (4) Khanna provided no expert opinion; (5) he billed and received $28,000 for his services; (6) "the bulk of [assistance Khanna] provided to [Patel], if, in fact, it was helpful, was in the nature of legal advice with regard to defendant against these claims"; (7) the value of Khanna's work was $5,000; (8) "to the extent that the defendants entered into an agreement . . . with [Khanna], it was based on fraud in every respect on the part of [Khanna]"; (9) Khanna knowingly made a series of false representations of material fact regarding his ability to practice law in Colorado, including that he had passed the Colorado bar examination; (10) defendants entered into the agreement in reliance on the fact that Khanna would be authorized to practice law "within a short period of time"; and (11) defendants' reliance was Justified in light of Khanna's representations and the fact he was an attorney in India.

The trial court also found that Khanna's claims were frivolous, vexatious, and groundless under § 13-17-101, et

seq., C.R.S. 2003, and awarded defendants their attorney fees.

Khanna filed several posttrial motions which were denied.

I.

Khanna first contends the trial court abused its discretion in granting defendants' motion to amend their answer and counterclaim. We conclude any error was harmless.

We will not disturb a trial court's ruling on a motion to amend a pleading absent an abuse of discretion. *Nelson v. Elway*, 971 P.2d 245 (Colo. App. 1998).

A party may amend the pleadings with leave of court or by written consent of the adverse party. Trial courts should freely grant such leave when justice so requires. C.R.C.P. 15(a); *see Benton v. Adams*, 56 P.3d 81 (Colo. 2002).

C.R.C.P. 15(a) reflects a liberal policy of amendment and encourages trial courts to look favorably on requests to amend. Trial courts may permit amendments to pleadings at any stage of the litigation process if undue delay does not result and other parties are not prejudiced by the amendments. *Benton v. Adams, supra; Nelson v. Elway, supra.*

Grounds for denying a motion to amend pleadings include undue delay and undue prejudice to the opposing party. *Benton v. Adams, supra*. Nevertheless, delay alone without any specifically resulting prejudice or any obvious design to harass is an insufficient basis for denying leave to amend. It is preferable to allow the amendment subject to any conditions necessary to avoid prejudice to the opposing parties. *River*

Mobile Home Park, Ltd. v. Dist. Court, 647 P.2d 660 (Colo. 1982).

A party demonstrates prejudice where the motion to amend was filed shortly before the trial date or on the eve of the discovery cut-off date and the amendment would require additional discovery. *See Werkmeister v. Robinson Dairy, Inc.*, 669 P.2d 1042 (Colo. App. 1983).

Here, defendants filed their original answer and counterclaims in November 2001. They denied all material allegations, including the existence of any contract, and asserted numerous affirmative defenses. Defendants' counterclaims sought reimbursement for payments made to Khanna "on the belief fostered by [Khanna] that he was a licensed attorney able to practice in Colorado" and damages for alleged defamation by Khanna.

In May 2002, the trial court entered a case management order providing that: motions to amend the pleadings must be made before April 21, 2002; written discovery must be completed by August 11, 2002; and depositions must be taken by September 10, 2002. The case was set for a two-day trial commencing October 21, 2002.

In July 2002, defendants moved to amend their answer and counterclaim, stating "that in order to litigate all relevant issues between these parties [defendants] must file a Counterclaim as set forth in the Amended Answer." The amended answer made an additional admission of fact and eliminated some of the affirmative defenses asserted in the original answer.

Defendants also changed their previous position denying the existence of any agreement, and asserted an amended

counterclaim for "fraudulent misrepresentation" that allegedly caused them to make payments to Khanna based on his false statements regarding his qualifications. While defendants did not abandon their previously asserted counterclaims, they explained at trial that "[they were] simply asking the Court to merge those two counterclaims."

Khanna argued that the motion was untimely under the case management order, was part of a pattern of undue delay, and was made in bad faith. He also alleged that in light of the new issues, he would need time to "amend his REPLY" -- presumably to the counterclaim--continue the trial, set a trial for five days instead of two, and enlarge other deadlines in the case management order.

On August 19, 2002, the trial court granted defendants leave to amend their answer. Khanna then propounded written discovery requests, but the trial court struck them as untimely.

We acknowledge the court granted defendants' motion to file the amendment after the written discovery deadline. Nevertheless, at the time of defendants' amendment, three weeks remained before the deposition deadline. It was not until a week after the deadline that Khanna requested depositions "to identify the pending issues."

Further, defendants' original and amended theories for recovery were similar, and Khanna's untimely written discovery requests were directed at his own claims for relief, rather than defendants' amended allegations and counterclaim.

Under these circumstances, we conclude Khanna did not demonstrate sufficient prejudice. Hence, the trial court did not

abuse its discretion in granting defendants' motion to amend their answer and counterclaim.

II.

Khanna next contends the trial court abused its discretion in denying his motions for a new trial. We disagree.

We review the trial court's decision to grant or deny a new trial under C.R.C.P. 59(a) for an abuse of discretion. *Buckley Powder Co. v. State*, 70 p.3d 547 (Colo. App. 2002).

A.

Khanna contends the trial court abused its discretion in denying a new trial for its failure to conduct a trial management conference and to issue a trial management order under C.R.C.P. 16. We disagree.

Generally, matters of pretrial procedure, including the adequacy of pretrial disclosure and witness endorsements, are conumitted to the sound discretion of the trial court. *J.P. v. Dist. Court*, 873 P.2d 745 (Colo. 1994). However, C.R.C.P. 16 imposes certain requirements on the parties and the trial court. The purpose of C.R.C.P. 16 is "to establish a uniform, court-supervised procedure involving case management which encourages professionalism and cooperation among counsel and parties to facilitate disclosure, discovery, pretrial and trial procedures." C.R.C.P. 16(a).

Specifically, the trial management order process is intended to "force the attorneys to make decisions on which claims or defenses should be dropped and identify legal issues that are truly contested." C.R.C.P. 16 cmt. c.

C.R.C.P. 16(f) provides: "No later than 30 days before the trial date, the responsible attorney shall file a proposed Trial Management order with the court. Prior to trial, a Trial Management Order shall be entered by the Court." For purposes of C.R.C.P. 16, if the plaintiff is not represented by counsel, the "responsible attorney" is defendant's counsel. C.R.C.P. 16(b)(2).

Where, as here, a party proceeds at trial without counsel, the responsible attorney must also "promptly file a Notice to Set Trial Management conference after all disclosures have been served and discovery has been completed and the court shall conduct a Trial Management conference on the record and issue a Trial Management Order." C.R.C.P. 16(f) (1), The trial management conference is mandatory if any party is appearing in the trial pro se. C.R.C.P. 16 cmt. c.

As relevant here, a trial management order contains matters includes a summary identification of the claims and defenses remaining for trial, stipulated facts, a list of witnesses and exhibits, a detailed description of the categories of damages or other relief sought, and a computation of economic damages claimed. C.R.C.P. 16 (f) (3) (I)-(VII).

Unless the enforcement of procedural requirements is essential to shield substantive rights, the policy favoring strict compliance with court rules is less compelling than the policy favoring resolution of disputes on the merits. The "focus of Rule 16 enforcement is on avoiding undue surprise and assuring that each party has the opportunity to adequately prepare for, and present evidence at, trial." *J.P. v. Dist. Court, supra*, 873 P.2d at 752.

Khanna is correct that the entry of a trial management order is mandatory and "would have governed the conduct of the trial," and he argues that because of the trial court's failure to issue a trial management order, he was unable to prepare for or present evidence at trial. According to Khanna, he sought to present certain documents at trial which he requested on August 2, 2002. He also requested a "case management conference" to "fix a Trial Date" and reset the relevant dates in accordance therewith.

Defendants objected, asserting that the original case management order was controlling, but Khanna, defendants' counsel, and the trial court took no action to set a trial management conference. After the trial court entered Judgment, Khanna filed a motion for mistrial and objected to proceeding without a trial management order.

Before trial, Khanna also filed a motion for summary judgment asserting he was entitled as a matter of law to Judgment on his claims, as supported by nearly 170 pages of documentary evidence. Defendants moved to strike the motion as untimely, but also responded on the merits and attached two affidavits disputing Khanna's factual recitations.

Khanna also filed a list of witnesses and exhibits identifying other documents to be introduced at trial, but he did not identify which documents, if any, defendants allegedly withheld until twelve days before trial.

We conclude Khanna was afforded a fair opportunity to resolve the dispute on the merits. Because the trial court did not vacate the trial date or grant Khanna's request to modify the pretrial deadlines, Khanna was not justified in assuming trial would not proceed as scheduled.

We further conclude he was not unfairly surprised at trial because defendants identified which facts they were disputing in their response to Khanna's motion for summary Judgment. At the beginning of trial, the parties also addressed the pretrial motions, and defendants clarified the theories on which they intended to proceed.

We similarly reject Khanna's related contentions that: (1) the trial court abused its discretion in issuing a protective order excusing defendants from responding to Khanna's untimely discovery requests, *see* C.R.C.P. 26(c); and (2) the trial court denied Khanna due process of law. *See Prefer v. PharmNetRx, LLC*, 18 p.3d 844 (Colo. App. 2000) (rules of procedure apply equally to litigant who elects co proceed pro se and parties represented by counsel); *People in re Petition of K.M.K.*, 780 P.2d 43 (colo. App. 1989) (essence of due process is basic fairness in procedure, requiring notice and opportunity to be heard).

Nor are we persuaded by Khanna's contention that he was unable to present testimonial evidence at trial. Although he endorsed a number of witnesses, the record does not indicate that he subpoenaed or asked to subpoena them to appear or testify trial.

Looking at the totality of these circumstanoes, including the thoroughness of the pretrial proceedings, Khanna's opportunities to obtain necessary evidence, and the limited number of claims and issues in this action, we conclude the purposes of C.R.C.P. 16 were satisfied. Accordingly, the trial court did not commit prejudicial error in failing to conduct a trial management conference and refusing to issue a trial management order before trial under C.R.C.P. 16, and it did not abuse its discretion in denying a new trial on this basis.

Khanna next contends the trial court erred in denying his motion to exclude testimony from defendants' expert and it abused its discretion in denying a new trial on this basis. We disagree.

C.R.C.P. 26 (a) (2) requires a party to disclose to other parties the identity of any expert who may present evidence at trial, identify the person's field of expertise, and provide a written report or summary.

However, the failure uo include a required summary of expert testimony is not reversible error where the opposing party has ample time to depose the expert. *See McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body*, 799 P.2d 394 (Colo. App. 1989) (party was notified more than one year before trial, all information in opposing party's possession was furnished, and expert was available to be deposed).

Here, defendants filed a timely expert witness disclosure certificate two months before the deposition deadline and more than four months before trial. Khanna sought to preclude the expert testimony based on the lack of an attached report. Defendants denied the existence of any report. The record shows no attempt by Khanna to interview or depose the expert.

We therefore conclude the trial court did not err in denying Khanna's motion to exclude testimony from defendants' expert, and we perceive no abuse of the trial court's discretion in later denying a new trial on this basis.

C.

Khanna next Contends the trial court erred in denying his request for a jury trial and also abused its discretion in denying a new trial on this ground. Again, we disagree.

Under C.R.C.P. 38(b), a party may request a trial by Jury of any issue triable by a jury by filing and serving a demand therefore "at any time after the commencement of an action but not later than ten days after service of the last pleading directed to such issue."

The failure properly to demand a Jury trial as required under C.R.C.P. 38(b) constitutes a waiver of that party's right to trial by jury. C.R.C.P. 38(e); *Whaley v. Keystone Life Ins. Co.*, 811 P.2d 404 (Colo. App. 1989).

Where a party is entitled to a Jury trial based upon an amended pleading, the ten-day period to serve a Jury demand does not begin to run until after the court grants leave to amend. *Nat'l Acceptance Co. v. Mars*, 780 P.2d 59 (Colo. App. 1989).

Here, the trial court granted defendants' motion to amend their answer on August 19, 2002, and Khanna filed his Jury demand on September 16, 2002. The trial court struck the demand as untimely and denied Khanna's motion to reconsider the issue. Because Khanna did not reply to the amendment, the last pleading directed to the issue was the amended counterclaim, which was accepted by the trial court on August 19. Because Khanna did not demand a Jury trial within ten days thereof, he waived his right to a trial by jury.

Accordingly, we conclude the trial court did not err in denying his request for a Jury trial, and it did not abuse its discretion in denying a new trial on this basis.

III.

We also reject Khanna's contention that the trial court abused its discretion in assessing attorney fees against him.

An award of attorney fees for instituting a frivolous, groundless, or vexatious action will not be disturbed on appeal if supported by the evidence unless the court has abused its discretion in making the award. *See* § 13-17-103 (1), C.R.S. 2003; *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063 (Colo. 1984); *Bd. of Comm'rs. v. Eason*, 976 P.2d 271 (Colo. App. 1998).

Under § 13-17-102(4), C.R.S. 2003, a trial court must assess attorney fees if it finds, among other things, that an attorney or party brought or defended an action that lacked substantial justification. An action that lacks substantial justification is one that was substantially frivolous, substantially groundless, or substantially vexatious. Section 13-17-102(4); *Western United Realty, Inc. v. Isaacs, supra; Bd. of Comm'rs v. Eason, supra.*

Khanna is an attorney in India and is now licensed to practice law in Colorado. But it is undisputed that when these events occurred between the parties and at the time of trial, he was not licensed to practice law in Colorado and appeared without an attorney. Thus, to assess fees against him, the trial court was required to make an additional finding that Khanna clearly knew, or reasonably should have known that his action, or any part thereof, was substantially frivolous, groundless, or vexatious. *See* § 13-17-102(6), C.R.S. 2003;

Artes-Roy v. Lyman, 833 p.2d 62 (Colo. App. 1992) (lack of requisite finding required reversal); *cf. Wimmershoff v. Finger*, 74 p.3d 529 (Colo. App. 2003) (pro se attorney litigant is not precluded from a fee award).

We conclude the court's finding here were sufficient. The trial court determined that Khanna's breach of contract and slander claims were frivolous, groundless, and vexatious. It specifically found: (1) Khanna stated to defendants that he would be duly licensed to practice law in Colorado within two weeks, but knew he would not be licensed during that time; (2) Khanna told defendants to fire their former attorney and hire him to represent them; (3) Khanna thus knowingly made a false representation to defendants; (4) the agreement for services was based on "fraud" and "illegal activity"; (5) the technical defenses Khanna provided in the criminal matter were "absolutely fruitless," "without foundation," and "could not have been less helpful"; (6) Khanna accepted fees for services rendered as an attorney and counsel at law; (7) Khanna's bills to defendants were "excessive"; (8) defendants were entitled to relief for fraudulent inducement either as an affirmative defense or a counterclaim; and (9) "there wasn't a single shred of evidence to support [Khanna's slander] claim." These findings are supported by the record and may not be disturbed.

The court directed defendants to submit an affidavit regarding the reasonableness of their fees, and they did so. Khanna asserted that the award was erroneous, but did not challenge the individual charges or the reasonableness thereof, and based on the affidavit submitted by defendants, the court entered judgment in the amount requested without further findings.

We thus perceive no abuse of the trial court's discretion

in assessing attorney fees against Khanna.

Judgments affirmed.

JUDGE CARPARELLI and JUDGE CRISWELL concur.

APPENDIX D

DENVER DISTRICT COURT, COLORADO
1437 Bannock Street
Denver, Colorado 80202

[Dated November 8, 2002]

Dr. Kishan K. Khanna	)
	)
Plaintiff	)
	)
v.	)
	)
Mr. Scott Jemm, President	)
Mr. Mahesh Patel, Vice President	)
Jemm Company	)
	)
Defendants	)
	)

Attorney or Party Without Attorney (Name and Address)
Bradley A. Lozow
Attorney for
LOZOW AND LOZOW, P.C.
1600 Stout Street, Suite 1910
Denver, Colorado 80202
Phone No.: 303.623.2323
Fax No.: 303.623.2458
Atty. Reg. No. 12639

COURT USE ONLY

Case No.: 01CV5606

Division: 9

ORDER AND JUDGMENT

THIS MATTER COMING ON FOR TRIAL on October 21st and October 22nd, 2002, and the Court after hearing the testimony and arguments of the parties, the witnesses testimony, and after reviewing the exhibits admitted herein and relevant statutory and case law, enters JUDGEMENT as follows:

The Court enters judgment in favor of the Defendants and against the Plaintiff on each and every Claim for Relief asserted by the Plaintiff in his Complaint.

Further, the Court finds that the Plaintiff has engaged in the unauthorized practice of law and to the extent that there was a contract between the parties, the same was void and illegal as being contrary to public policy due to the Plaintiff's unauthorized practice of law. Moreover, the Court finds that the Plaintiff's claims were vexatious, groundless and frivolous pursuant to §13-17-101, et. seq. C.R.S. and awards the Defendant's their attorney's fees. Counsel for the Defendants shall submit an Affidavit of Attorney's Fees on or before November 21, 2002. The Plaintiff may only object to the reasonableness of the attorney's fees requested.

The Court further enters judgment in favor of the Deferldants and against the Plaintiff on their Counterclaim in the amount of "Twenty-Two Thousand Dollars ($22,000.00), and interest shall accrue thereon st the rate

of eight percent (8%) per annum commencing October 22, 2002, as allowed by Statute.

DONE and SIGNED this 8 day of November, 2002, nunc pro tunc, October 22, 2002.

BY THE COURT

/s/ _____
DISTRICT COURT JUDGE

PREPARED AS TO FORM:

BY: /s/ _____
Bradley A, Lozow, No, 12639

APPENDIX E

DENVER DISTRICT COURT, COLORADO
1437 Bannock Street
Denver, Colorado 80202

[Dated September 26, 2002]

Dr. Kishan K. Khanna	)
	)
Plaintiff	)
	)
v.	)
	)
Mr. Scott Jemm, President	)
Mr. Mahesh Patel, Vice President	)
Jemm Company	)
	)
Defendants	)
	)

Bradley A. Lozow
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Attorney for Defendants.

COURT USE ONLY

Case No.: 01CV5606

Division: 9

ORDER RE: MOTION FOR PROTECTIVE ORDER

THIS COURT BEING FULLY ADVISED OF THE PREMISES HEREIN DOTH ORDER AS FOLLOWS:

The Defendants request for a Protective Order is hereby granted. Thus, the Defendants are not required to respond to the Plaintiff's written discovery requests and/or requests for admissions.

~~The Plaintiff must pay to counsel for the Defendants attorney's fees in the amount of $ _____ On or before _____, 2002.~~

DONE and SIGNED this 26 day of September, 2002.

BY THE COURT

/s/ _____

APPENDIX F

DISTRICT COURT, DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

[Dated August 19, 2002]

PLAINTIFF:

Dr. Kishan K. Khanna

DEFENDANTS:

Jemm Company and Mahesh Patel, Vice President of Jemm Company

Bradley A. Lozow
LOZOW AND LOZOW, P.C.
1600 Stout Street, Suite
Denver, Colorado 80202
Phone No.: 303.623.2323
Fax No.: 303.623.2458
Atty. Reg. No. 20896
Attorney for Respondent Defendants.

COURT USE ONLY

Case No.: 01CV5606

Division: Ctrm: 9

ORDER RE:
COMBINED RESPONSE TO PLAINTIFF'S OBJECTION TO DEFENDANTS EXPERT WITNESS DISCLOSURES AND TO DEFENDANTS MOTION TO AMEND

THIS COURT BEING FULLY ADVISED OF THE PREMISES HEREIN DOTH ORDER AS FOLLOWS

_X_ That Defendant's Motion to Amend Answer is granted.

_X_ The Plaintiff's Motion Objecting to the Defendant's Expert Disclosure is denied.

~~___ The Defendant's are granted attorney's fees in the amount of $ _____ Which are to be paid on or before _____, 2002.~~

BY THE COURT:

/s/ _____ 8/19/02
DISTRICT COURT JUDGE

APPENDIX G

DISTRICT COURT, DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202

[Dated May 10, 2002]

PLAINTIFF:

Dr. Kishan K. Khanna

DEFENDANTS:

Jemm Company and Mahesh Patel, Vice President of Jemm Company

Bradley A. Lozow
LOZOW AND LOZOW, P.C.
1600 Stout Street, Suite
Denver, Colorado 80202
Phone No.: 303.623.2323
Fax No.: 303.623.2458
Atty. Reg. No. 20896
Attorney for Respondent Defendants.

COURT USE ONLY

Case No.: 01CV5606

Division: Ctrm: 9

CASE MANAGEMENT ORDER

I. TRIAL SETTING

DATE OF TRIAL Monday, October 21, 2002
at 8:30 a.m.

LENGTH OF TRIAL HEARING 2 days

The parties shall promptly notify the Court in writing if the anticipated length of trial changes.

II. DISCLOSURES

A. DISCLOSURES PURSUANT TO C.R.C.P.26(a)(1).

The parties have exchanged disclosures and they are annexed as Appendix A (Plaintiff) and Appendix B (Defendant).

B. Disclosures Pursuant to C.R.C.P.26(a)(2)

Plaintiffs (supplementary) disclosurespursuant to CRCP 16(b) (1) (II) shall be completed 120 days before the trial date that is before 21st June 2002. Defendants' (supplementary) disclosures if any pursuant to CRCP 16(b)(I)(II) shall be completed 30 days thereafter that is no later than 21st July 2002.

Plaintiff does not anticipate the need for expert witnesses at present. Plaintiff's expert disclosures if any shall be due on or before 21st June 2002. Defendants' expert disclosures shall be due 30 days after Plaintiff's expert disclosures. Rebuttal if any by Plaintiff shall be made by

Plaintiff within 20 days of Defendants' disclosures, that is before 10th August, 2002.

C. CONTINUITING DUTY TO DISCLOSE

The parties, pursuant to C.R,C.P. 26(e), acknowledge a continuing duty to timely supplement or correct the information providvd pursuant to C.R.C.P. 26(a)(1) and C.R.C.P. 26(A)(2)

III IDENTIFICATION OF PERSONS, DOCUMENTS AND TANGIBLE THINGS

The Parties will identify all persons thai may be called as witnesses, as well as, all documents and tangible things that might be introduced at trial no later than 60 days before trial that is no later than 20th August, 2002.

IV DISCOVERY SCHEDULE

A. DEPOSITIONS

Each party may take depositions of each adverse party and two other persons. Such depositions shall be completed no later than 40 days prior to trail that is no later than 10th Sept. 2002. This limitation shall not apply to expert depositions or depositions taken for the purpose of production of documents.

The date for completion of all discovery shall be no later than 10 days before issue of Trial Management Order in pursuance to Subsection (e) of C.R.P.C.Rulel6.

B. INTERROGATORIES

Each party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. Such int:rrogatories must be submitted so that the answers can be received no later than 40 days before the trial date, that is no later than l 0th September 2002.

C. REQUEST FOR PRODUCTION OF DOCUMENTS OR TANGIBLE THINGS

Each party may serve on each adverse party a request for production of documents or tangible things that shall be limited to 20 in number, each of which shall consist of a single request. Such request for production must be submitted so that the responses are received no later than 40 days prior to the trial or before 10th Sept. 2002.

D. REQUEST FOR ADMISSIONS

Each party may serve on each adverse party up to 20 requests for admissions, each of which shall consist of a single request. Such requests for admissions must be submitted so that answers will be received no lamr than 40 days prior to the trial or before 10th September 2002.

Plaintiff is appearing pro se and is aware of the costs of discovery. Counsel for the Defendant certifies that he has advised his clients of the estimated costs and fees involved in conducting discovery contemplated herein.

V TIME TO JOIN ADDITIONAL PARTIES AND AMEND PLEADINGS

If any party desires to add additional parties or to amend the pleadings, motions for the same will be made not later than 180 days before the trial date that is before 21st April, 2002.

VI PRETRIAL MOTIONS

The Plaintiff has a pending motion for sanctions against the Defendants and their prior attorney. All other pretrial motions other than motions relating to discovery shall be filed no later than 75 days before the trial date that is no later than 6th August 2002.

VII SETTLEMENT

The Plaintiff submits that his efforts to discuss settlement with the Defendants' Counsel failed. It is ordered that the parties shall discuss settlement and will comply with the Court's Orders regarding Alternative Dispute Resolution. The parties shall meet at least two times for settlement before 21st September 2002.

VIII OTHER MATTERS

No other matters are currently pending.

IX. AFFECT OF CASE MANAGEMENT ORDER

This Case Management Order shall control the course of this action prior to the entry of the Trial Management Order and may not be amended except by the consent of the parties and the approval of the Court or Order of the Court. The

Court shall not entertain a Motion to modify the Case Management Order unless counsel for the moving party has conferred, or made reasonable efforts to confer with opposing counsel concerning the matter in dispute before filing the motion. Counsel for the moving party shall include a Certificate of Compliance with this Rule in any such Motion. In the event of arnbiguity in the Case Management Order, the Court shall interpret the Order in the manner in which best advances the interests of justice.

DONE and SIGNED this ___ day of May, 2002.

BY THE COURT:

_____

DISTRICT COURT JUDGE

PREPARED AS TO FORM:

/s/ _____

Bradley A. Lozow, No. 12639

CERTIFICATE OF MAILING

I hereby certify this 10th day of May, 2002 that I deposited a true and correct copy of the within AMENDED CASE MANAGEMENT ORDER, in the U.S. Mails, postage prepaid, addressed as follows:

Dr. Kishan K. Khanna
16835 East Navarro Drive
Aurora, Colorado 80013

/s/ _____

APPENDIX H

COLORADO RULES OF CIVIL PROCEDURE

Rule 16. Case Management and Trial Management.

(a) Purpose and Scope. The purpose of this Rule 16 is to establish a uniform, court-supervised procedure involving case management which encourages professionalism and cooperation among counsel and parties to facilitate disclosure, discovery, pretrial and trial procedures. This Rule shall govern case management in all district court civil cases except as provided herein. This Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 106 and 120, and other similar expedited proceedings, unless otherwise ordered by the court or stipulated by the parties. This Rule 16 also shall not apply to civil actions that are governed by Simplified Procedure under C.R.C.P. 16.1, except as specifically provided in Rule 16.1. The disclosures and information required to be included in both the Case Management and Trial Management Orders interrelate to discovery authorized by these rules. The right of discovery shall not constitute grounds for failing to timely disclose information required by this Rule, nor shall this Rule constitute a ground for failing to timely disclose any information sought pursuant to discovery.

(b) Presumptive Case Management Order. Except as provided in sections (c) - (e) of this Rule, the parties shall not file a Case Management Order and subsections (1) - (10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is

at issue until otherwise required pursuant to section (f) of this Rule.

(1) At Issue Date. For the purposes of this Rule, a case shall be deemed at issue at such time as all parties have been served and all pleadings permitted by C.R.C.P. 7 have been filed or defaults or dismissals have been entered against all non-appearing parties, or at such other time as the court may direct.

(2) The Responsible Attorney. For purposes of this Rule, "the responsible attorney" shall mean plaintiff's counsel, if the plaintiff is represented by counsel, or if not, the defense counsel who first enters an appearance in the case. The responsible attorney shall schedule conferences among the parties, prepare and file the certificates of compliance, prepare and submit the proposed Modified Case Management Order, if applicable, and prepare and submit the proposed Trial Management Order.

(3) Meet and Confer. No later than 15 days after the case is at issue, lead counsel for each party and any party who is not represented by counsel shall confer with each other about the nature and basis of the claims and defenses; the matters to be disclosed pursuant to C.R.C.P. 26(a)(1); and whether a Modified Case Management Order is necessary pursuant to subsection (c) of this Rule.

(4) Trial Setting. No later than 30 days after the case is at issue, the responsible attorney shall set the case for trial pursuant to C.R.C.P. 121 § 1-6, unless otherwise ordered by the Court.

(5) Disclosures. No later than 30 days after the case is at issue, the parties shall serve their C.R.C.P. 26(a)(1)

disclosures. The parties shall disclose expert testimony in accordance with C.R.C.P. 26(a)(2).

(6) Settlement Discussions. No later than 35 days after the case is at issue, the parties shall explore the possibilities of a prompt settlement or resolution of the case.

(7) Certificate of Compliance. No later than 45 days after the case is at issue, the responsible attorney shall file a Certificate of Compliance. The Certificate of Compliance shall state that the parties have complied with all requirements of subsections (b)(3)-(6), inclusive, of this Rule or, if they have not complied with each requirement, shall identify the requirements which have not been fulfilled and set forth any reasons for the failure to comply.

(8) Time to Join Additional Parties and Amend Pleadings. No later than 120 days after the case is at issue, all motions to amend pleadings and add additional parties to the case shall be filed.

(9) Pretrial Motions. No later than 35 days before the trial date, pretrial motions shall be filed, except for motions pursuant to C.R.C.P. 56, which must be filed no later than 75 days before the trial date.

(10) Discovery Schedule. Discovery shall be limited to that allowed by C.R.C.P. 26(b) (2). Except as provided in C.R.C.P. 26(d), discovery may commence 45 days after the case is at issue. The date for completion of all discovery shall be 50 days before the trial date.

(c) Modified Case Management Order. Any of the provisions of section (b) of this Rule may be modified by the

entry of a Modified Case Management Order pursuant to this section and section (d) of this Rule.

(1) Stipulated Modified Case Management Order. No later than 45 days after the case is at issue, the parties may file a Stipulated proposed Modified Case Management Order, supported by a specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such proposed order only needs to set forth the proposed provisions which would be changed from the presumptive Case Management Order set forth in section (b) of this Rule. The Court may approve and enter the Stipulated Modified Case Management Order, or may set a case management conference.

(2) Disputed Motions for Modified Case Management Orders. If any party wishes to move for a Modified Case Management Order, lead counsel and any unrepresented parties shall confer and cooperate in the development of a proposed Modified Case Management Order. A motion for a Modified Case Management Order and one form of the proposed Order shall be filed no later than 45 days after the case is at issue. To the extent possible, counsel and any unrepresented parties shall agree to the contents of the proposed Modified Case Management Order but any matter upon which all parties cannot agree shall be designated as "disputed" in the proposed Modified Case Management Order. The proposed Order shall contain specific alternate provisions upon which agreement could not be reached and shall be supported by specific showing of good cause for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2). Such motion only needs to set forth the proposed provisions which would be changed from the presumptive case management Order set forth in section (b) of this Rule. The motion for a modified

case management order shall be signed by lead counsel and any unrepresented parties, or shall contain a statement as to why it is not so signed.

(d) Case Management Conference. If there is a disputed modified case management order or if any counsel or unrepresented party believes that it would be helpful to conduct a case management conference, a notice to set case management conference shall be filed stating the reasons why such a conference is requested. If a Notice to Set Case Management conference is filed concerning a disputed Modified Case Management Order, or if the Court determines that such a conference should be held, the Court shall set a Case Management Conference. The conference may be conducted by telephone. The court shall promptly enter a Modified Case Management Order containing such modifications as are approved by the Court.

(e) Amendment of the Case Management Order. At any time later than 45 days after the case is at issue, a party wishing to amend the presumptive Case Management Order or a Modified Case Management Order shall file a motion stating each proposed amendment and a specific showing of good cause for the timing and necessity for each modification sought including, where applicable, the grounds for good cause pursuant to C.R.C.P. 26(b)(2).

(f) Trial Management Order. No later than 30 days before the trial date, the responsible attorney shall file a proposed Trial Management order with the court. Prior to trial, a Trial Management Order shall be entered by the Court.

(1) Cases with Unrepresented Parties. If any unrepresented party will be participating in the trial, the responsible attorney shall promptly file a Notice to Set Trial

Management conference after all disclosures have been served and discovery has been completed and the court shall conduct a Trial Management conference on the record and issue a Trial Management Order pursuant to subsection (f)(4) of this Rule. The responsible attorney shall submit a proposed Trial Management Order prior to the conference by filing the same with the Court and serving a copy thereof on all other parties.

(2) All Parties Represented by Counsel.

(A) If all parties are represented by counsel, lead counsel for each party shall confer with each other to develop jointly a proposed trial management order. Plaintiff's counsel shall be responsible for scheduling conferences among counsel and preparing and filing the proposed trial management order.

(B) Not later than 40 days before the trial date, each counsel shall exchange a draft of the lists of witnesses and exhibits required in subsections (f)(3)(VI)(A) and (B) of this Rule together with a copy of each documentary exhibit to be listed pursuant to subsection (f)(3)(VI)(B) of this Rule.

(C) To the extent possible, counsel shall agree to the contents of the proposed Trial Management Order. Any matter upon which all counsel cannot agree shall be designated as "disputed" in the proposed order and the proposed trial management order shall contain specific alternative provisions upon which agreement could not be reached. The proposed Trial Management Order shall be signed by lead counsel for each party and shall include a place for the court's approval.

(D) If there are any disputed matters or if any counsel believes that it would be helpful to conduct a Trial Management conference, the filing of the proposed Trial

Management order shall be accompanied by a Notice to Set Trial Management conference, stating the reasons why such a conference is requested.

(3) Form of Trial Management Order. The proposed Trial Management Order shall contain the following matters under the following captions and in the following order:

I. STATEMENT OF CLAIMS AND DEFENSES. The parties shall set forth a brief description of the nature of the case and a summary identification of the claims and defenses remaining for trial. Any claims or defenses set forth in the pleadings which will not be at issue at trial shall be designated as "withdrawn" or "resolved."

II. STIPULATED FACTS. The parties shall set forth a plain, concise statement of all facts which the trier of fact shall accept as undisputed. If the matter is scheduled for a jury trial, a proposed jury instruction containing these undisputed facts shall be submitted as provided in section (g) of this Rule.

III. PRETRIAL MOTIONS. The parties shall list any pending motions.

IV. TRIAL BRIEFS. The parties shall indicate whether trial briefs will be filed, including a schedule for their filing. Trial briefs shall be filed no later than 10 days before the trial date.

V. ITEMIZATION OF DAMAGES OR OTHER RELIEF SOUGHT. Each claiming party shall set forth a detailed description of the categories of damages or other relief sought and a computation of any economic damages claimed.

VI. IDENTIFICATION OF WITNESSES AND EXHIBITS--JUROR NOTEBOOKS. Each party shall provide the following information: -

(A) Witnesses. Each party shall attach to the proposed trial management order separate lists containing the name, address, telephone number and the anticipated length of each witness' testimony, including cross examination, (i) of any person whom the party "will call" and (ii) of any person whom the party "may call" as a witness at trial. When a party lists a witness as a "will call" witness, the party does not have to call the witness to testify, but must ensure that the witness will be available to testify at trial if called by any party without the necessity for any other party to subpoena the witness for the trial. For each expert witness, the list shall also indicate whether the opposing party accepts or challenges the qualifications of a witness to testify as an expert as to the opinions expressed. If there is a challenge, the list shall be accompanied by a resume setting forth the basis for the expertise of the challenged witness. Where appropriate, the court may order the parties to provide written notice to the other parties and to the court of the order in which the parties expect to present their witnesses.

(B) Exhibits. Each party shall attach to the proposed trial management order a list of exhibits including physical evidence which the party intends to introduce at trial. Unless stipulated by the parties, each list shall assign a number (for plaintiff or petitioner) or letter (for defendant or respondent) designation for each exhibit. Proposed excerpted or highlighted exhibits shall be attached. If any party objects to the authenticity of any exhibit as offered, such objection shall be noted on the list, together with the ground therefor. If any party stipulates to the admissibility of any exhibit, such stipulation shall be noted on the list. On or before the trial

date, a set of the documentary exhibits shall be provided to the court.

(C) Juror Notebooks. Counsel for each party shall confer about items to be included in juror notebooks as set forth in C.R.C.P. 47(t) and at the Trial Management conference or other date set by the Court make a joint submission to the Court of items to be included in the juror notebook. By agreement of the parties or in the discretion of the Court, important exhibits may be highlighted or excerpted and may be included in juror notebooks.

(D) Deposition and other preserved testimony. If the preserved testimony of any witness is to be presented the proponent of the testimony shall provide the other parties with its designations of such testimony at least 25 days before the trial date. Any other party may provide all other parties with its designations and shall do so at least 10 days before the trial date. The proponent may provide reply designations and shall do so at least 5 days before the trial date. A copy of the preserved testimony to be presented at trial shall be submitted to the court and include the proponent's and opponent's anticipated designations of the pertinent portions of such testimony or a statement why designation is not feasible at least three days before the trial date. If any party wishes to object to the admissibility of the testimony or to any tendered question or answer therein, it shall be noted, setting forth the grounds therefor.

VII. TRIAL EFFICIENCIES AND OTHER MATTERS. If the anticipated length of the trial has changed, the parties shall so indicate. The parties shall also include any other matters which are appropriate under the circumstances of the case or directed by the court to be included in the proposed Trial Management Order. The parties shall confirm that they

have considered ways in which the use of technology can simplify the case and make it more understandable.

(4) Approval of Trial Management Order. If a Notice to Set Trial Management Conference is filed or the Court determines that such a conference should be held, the Court shall set a trial management conference. The conference may be conducted by telephone. The court shall promptly enter the Trial Management Order.

(5) Effect of Trial Management Order. The Trial Management Order shall control the subsequent course of the trial. Modification to or divergence from the Trial Management Order, whether prior to or during trial, shall be permitted upon a demonstration that the modification or divergence could not with reasonable diligence have been anticipated. In the event of any ambiguity in the Trial Management Order, the Court shall interpret the Order in the manner which best advances the interests of justice.

(g) Jury Instructions and Verdict Forms. Counsel for the parties shall confer to develop jointly proposed jury instructions and verdict forms to which the parties agree. No later than 3 days prior to the date scheduled for commencement of the trial or such other time as the court shall direct, a set of the proposed jury instructions and verdict forms shall be filed with the courtroom clerk. The first party represented by counsel to demand a jury trial pursuant to C.R.C.P. 38 and who has not withdrawn such demand shall be responsible for filing the proposed jury instructions and verdict forms. If any jury instruction or verdict form is disputed, the party propounding the instruction or verdict form shall separately file with the courtroom clerk a set of the disputed jury instructions and verdict forms. Each instruction or verdict form shall have attached a brief statement of the

legal authority on which the proposed instruction or verdict form is based. Compliance with this Rule shall not deprive parties of the right to tender additional instructions or verdict forms or withdraw proposed instructions or verdict forms at trial. All jury instructions and verdict forms submitted by the parties shall be in final form and reasonably complete. The court shall permit the use of photocopied instructions and verdict forms, without citations, in its submission to the jury.

COMMITTEE COMMENT

History and Philosophy

Effective differential case management has been a long-term goal of the Bench, Bar, and Public. Adoption by the Colorado Supreme Court of C.R.C.P. 121 and its practice standards in 1983; revised C.R.C.P. 16 in 1988 to require earlier disclosure of matters necessary for trial; and the Colorado Standards for Case Management–Trial Courts in 1989 were a continuing and evolving effort to achieve an orderly, fair and less expensive means of dispute resolution. Those rules and standards were an improvement over prior practice where there was no prescribed means of case management, but problems still remained. There were problems of discovery abuse, late or inadequate disclosure, lack of professionalism, slow case disposition, outrageous expense and failure to achieve an early settlement of those cases that ultimately settled.

In the past several years, a recognition by the organized Bar of increasing unprofessional conduct by some attorneys led to further study of problems in our civil justice system and new approaches to resolve them. New Federal Rules of Civil Procedure were developed to require extensive early disclosure and to limit discovery. The Colorado Bar

Association's Professionalism Committee made recommendations concerning improvements of Colorado's case management and discovery rules.

After substantial input through surveys, seminars and Bench/Bar committees, the Colorado Supreme Court appointed a special Ad Hoc Committee to study and make recommendations concerning Colorado's Civil Rules pertaining to case management, disclosure/discovery and motions practice. Reforms of Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, 121 § 1-11, 121 § 1-12, 121 § 1-15, and 121 § 1-19 were developed by this Committee.

The heart of the reform is a totally rewritten Rule 16 which sets forth a new system of case management. Revisions to Rules 26, 29, 30, 31, 32, 33, 34, 36, and 37 are patterned after December 1, 1993, revisions to Federal Rules of the same number, but are not in all respects identical. Colorado Rules 16, 26, 29, 30, 31, 32, 33, 34, 36, and 37 were developed to interrelate with each other to provide a differential case management/early disclosure/limited discovery system designed to resolve difficulties experienced with prior approaches. Changes to C.R.C.P. 121 § § 1-11, 1-12, 1-15, and 1-19 are designed to interrelate with the case management/disclosure/ discovery reform to improve motions practice. In developing these rules, the Committee paid particular attention to the 1993 revisions of the Federal Rules of Civil Procedure and the work of the Colorado Bar Association regarding professionalism.

Operation

New Rule 16 and revisions of Rules 26, 29, 30, 31, 32, 33, 34, 36, 37, 51, and 121 § § 1-11, 1-12, 1-15, and 1-19 are designed to accomplish early purposeful and reasonably

economical management of cases by the parties with Court supervision. The system is based on communication, including required early disclosure of persons with knowledge and documents relevant to the case, which disclosure should lead in many cases to early evaluation and settlement efforts, and/or preparation of a workable Case Management Order. Lead attorneys for each party are to communicate with each other in the spirit of cooperation in the preparation of both the Case and Trial Management Orders. Court Case Management Conferences are available where necessary for any reasonable purpose. The Rules require a team effort with Court leadership to insure that only appropriate discovery is conducted and to carefully plan for and conduct an efficient and expeditious trial.

Rules 16 and 26 should work well in most cases filed in Colorado District Courts. However, where a case is complex or requires special treatment, the Rules provide flexibility so that the parties and Court can alter the procedure. The importance of economy is encouraged and fostered in a number of ways, including authorized use of the telephone to conduct in-person attorney and Court conferences.

The Committee acknowledges the greater length of the Rules comprising this reformed system. However, these Rules have been developed to describe and to eliminate "hide-the-ball" and "hardball" tactics under previous Disclosure Certificate and Discovery Rules. It is expected that trial judges will assertively lead the management of cases to ensure that justice is served. In the view of the Committee, abuses of the Rules to run up fees, feed egos, bludgeon opponents into submission, force unfair settlements, build cases for sanctions, or belittle others should not be tolerated.

These Rules have been drafted to emphasize and foster professionalism and to de-emphasize sanctions for non-compliance. Adequate enforcement provisions remain. It is expected that attorneys will strive diligently to represent their clients' best interests, but at the same time conduct themselves as officers of the Court in the spirit of the recently adopted Rules of Professional Conduct.

(a)

The purpose and scope of Rule 16 are as set forth in subsection (a). Unless otherwise ordered by the Court or stipulated by the parties, Rule 16 does not mandatorily apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, Rule 120, or other expedited proceedings. Provisions of the Rule could be used, however, and Courts involved in those proceedings should consider their possible applicability to particular cases.

(b)

The "Case Management Order" is the central coordinating feature of the Rule 16 case management system. It comes at a relatively early but realistic time in the case. The Case Management Order governs the trial setting; contains or coordinates disclosure; limits discovery and establishes a discovery schedule; establishes the deadline for joinder of additional parties and amendment of pleadings; coordinates handling of pretrial motions; requires a statement concerning settlement; and allows opportunity for inclusion of other provisions necessary to the case.

Lead counsel for each of the parties are required to confer about the nature and bases of their claims and defenses, discuss the matters to be disclosed and explore the

possibilities of a prompt settlement or other resolution of the case. As part of the conferring process, lead counsel for each of the parties are required to cooperate in the development of the Case Management Order, which is then submitted to the Court for approval. If there is disagreement about any aspect of the proposed Case Management Order, o if some aspect of the case requires special treatment, the parties are entitled to an expeditious Case Management Conference. If any party is appearing pro se an automatic mandatory Case Management Conference is triggered.

A time line is specified in C.R.C.P. 16(b) for the C.R.C.P. 26(a)(1) disclosures, conferring of counsel and submission of the proposed Case Management Order. The time line in section (b) is triggered by the "at issue" date, which is defined at the beginning of C.R.C.P. 16(b).

Disclosure requirements of C.R.C.P. 26, including the duty to timely supplement and correct disclosures, together with sanction provisions of C.R.C.P. 37 for failure to make disclosure, are incorporated by reference. Because of mandatory disclosure, there should be substantially less need for discovery. Presumptive limitations on discovery are specified in C.R.C.P. 26(b)(2). The limitations contained in C.R.C.P. 26 and Discovery Rules 29, 30, 31, 32, 33, 34, and 36 are incorporated by reference and provision is made for discovery above presumptive limitations if, upon good cause shown (as defined in C.R.C.P. 26(b)(2)), the particular case warrants it. The system established by C.R.C.P. 16(b)(1)(IV) requires the parties to set forth and obtain Court approval of a schedule of discovery for the case, which includes the timing and number of particular forms of discovery requests. The system established by C.R.C.P. 16(b)(1)(IV) also requires lead counsel for each of the parties to set forth the basis of and necessity for all such discovery and certify that

they have advised their clients of the expenses and fees involved with each such item of discovery. The purpose of such discovery schedule and expense estimate is to bring about an advanced realization on the part of the attorneys and clients of the expense and effort involved in the schedule so that decisions can be made concerning propriety, feasibility, and possible alternatives (such as settlement or other means of obtaining the information). More stringent standards concerning the necessity of discovery contained in C.R.C.P. 26(b)(2) are incorporated into C.R.C.P. 16(b)(l)(IV). A Court should not simply "rubber-stamp" a proposed discovery schedule even if agreed upon by counsel.

A Court Case Management Conference will not be necessary in every case. It is anticipated that many cases will not require a Court Case Management Conference, but such conference is available should the parties or the Court find it necessary. Regardless of whether there is a Court Case Management Conference, there will always be the Case Management Order which, along with the later Trial Management Order, should effectively govern the course of the litigation through the trial.

(c)

The Trial Management Order is jointly developed by the parties and filed with the Court as a proposal no later than thirty days prior to the date scheduled for the trial (or at such other time as the Court directs). The Trial Management Order contains matters for trial (see specific enumeration of elements to be contained in the Trial Management Order). It should be noted that the Trial Management Order references the Case Management Order and, particularly with witnesses, exhibits, and experts, contemplates prior identification and disclosure concerning them. Except with permission of the

Court based on a showing that the witness, exhibit, or expert could not have, with reasonable diligence, been anticipated, a witness, exhibit, or expert cannot be revealed for the first time in the Trial Management Order.

As with the Case Management Order, Trial Management Order provisions of the Rule are designed to be flexible so as to fit the particular case. If the parties cannot agree on any aspect of the proposed Trial Management Order, a Court Trial Management Conference is triggered. The Court Trial Management Conference is mandatory if any party is appearing in the trial pro se.

As with the Case Management Order procedure, many cases will not require a Court Trial Management Conference, but such a conference is available upon request and encouraged if there is any problem with the case that is not resolved and managed by the Trial Management Order.

The Trial Management Order process will force the attorneys to make decisions on which claims or defenses should be dropped and identify legal issues that are truly contested. Both of those requirements should reduce the expenses associated with trial. In addition, the requirement that any party seeking damages define and itemize those damages in detail should facilitate preparation and trial of the case.

Subsection (c)(IV), pertaining to designation of "order of proof," is a new feature not contained in Federal or State Rules. To facilitate scheduling and save expense, the parties are required to specifically identify those witnesses they anticipate calling in the order to be called, indicating the anticipated length of their testimony, including cross-examination.

(d)

Provision is made in the C.R.C.P. 16 case management system for an orderly advanced exchange and filing of jury instructions and verdict forms. Many trial courts presently require exchange and submission of a set of agreed instructions during the trial. C.R.C.P. 16(d) now requires such exchange, conferring, and filing no later than three (3) days prior to the date scheduled for the commencement of the trial (or such other time as the Court otherwise directs).

Rule 26. General Provisions Governing Discovery; Duty of Disclosure.

(a) Required Disclosures; Methods to Discover Additional Matter.

Unless otherwise ordered by the court or stipulated by the parties, provisions of this Rule shall not apply to domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings.

(1) Disclosures. Except to the extent otherwise directed by the court, a party shall, without awaiting a discovery request, provide to other parties:

(A) The name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying who the person is and the subjects of the information;

(B) A listing, together with a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings, making available for inspection and copying the documents or other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34;

(C) A description of the categories of damages sought and a computation of any category of economic damages claimed by the disclosing party, making available for inspection and

copying pursuant to C.R.C.P. 34 the documents or other evidentiary material, not privileged or protected from disclosure, as though a request for production of those documents had been served pursuant to C.R.C.P. 34; and

(D) Any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment, making such agreement available for inspection and copying pursuant to C.R.C.P. 34.

The timing of disclosures shall be within 30 days after the case is at issue as defined in C.R.C.P. 16(b). A party shall make the required disclosures based on the information then known and reasonably available to the party and is not excused from making such disclosures because the party has not completed investigation of the case or because the party challenges the sufficiency of another party's disclosures or because another party has not made the required disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by subsection (a)(1) of this Rule, a party shall disclose to other parties the identity of any person who may present evidence at trial, pursuant to Rules 702, 703, or 705 of the Colorado Rules of Evidence together with an identification of the person's fields of expertise.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall:

(I) With respect to a witness who is retained or specially employed to provide expert testimony, or whose duties as an

employee of the party regularly involve giving expert testimony, be accompanied by a written report or summary. The report or summary shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. In addition, if a report is issued by the expert it shall be provided.

(II) With respect to a witness who may be called to provide expert testimony but is not within the description contained in subsection (a)(2)(B)(I) above, the report or summary shall contain the qualifications of the witness and a complete statement describing the substance of all opinions to be expressed and the basis and reasons therefor.

(C) Unless otherwise provided in the Case Management Order, the timing of the disclosures shall be as follows:

(I) The disclosure by a claiming party under a complaint, counterclaim, cross-claim or third-party claim shall be made at least 120 days before the trial date.

(II) The disclosure by a defending party shall be made within 30 days after service of the claiming party's disclosure, provided, however, that if the claiming party serves its disclosure earlier than required under subparagraph 26(a)(2)(C)(I), the defending party is not required to serve its disclosures until 90 days before the trial date.

(III) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subparagraph (a)(2)(C)(II) of this Rule, such disclosure shall be made within 20 days after the disclosure made by the other party.

(3) [There is no Colorado Rule - see instead C.R.C.P. 16(c).]

(4) Form of Disclosures; Filing. All disclosures pursuant to subparagraphs (a)(1) and (a)(2) of this Rule shall be made in writing, signed pursuant to C.R.C.P. 26(g)(1), served and promptly filed with the court, but such court filings shall not include copies of any disclosed documents or other evidentiary material, or any expert reports or summaries.

(5) Methods to Discover Additional Matters. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, pursuant to C.R.C.P. 34; physical and mental examinations; and requests for admission. Discovery at a place within a country having a treaty with the United States applicable to the discovery must be conducted by methods authorized by the treaty except that, if the court determines that those methods are inadequate or inequitable, it may authorize other discovery methods not prohibited by the treaty.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Subject to the limitations and considerations contained in subsection (b)(2) of this Rule,

parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. Except upon order for good cause shown, discovery shall be limited as follows:

(A) A party may take one deposition of each adverse party and of two other persons, exclusive of persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2). The scope and manner of proceeding by way of deposition and the use thereof shall otherwise be governed by C.R.C.P. Rules 26, 28, 29, 30, 31, 32 and 45.

(B) A party may serve on each adverse party 30 written interrogatories, each of which shall consist of a single question. The scope and manner of proceeding by means of written interrogatories and the use thereof shall otherwise be governed by C.R.C.P. Rules 26 and 33.(C) A party may obtain a physical or mental examination (including blood group) of a party or of a person in the custody or under the legal control of a party pursuant to C.R.C.P. 35.

(D) A party may serve each adverse party requests for production of documents or tangible things or for entry, inspection or testing of land or property pursuant to C.R.C.P.

34, except such requests for production shall be limited to 20 in number, each of which shall consist of a single request.

(E) A party may serve on each adverse party 20 requests for admission, each of which shall consist of a single request. A party may also serve requests for admission of the genuineness of up to 50 separate documents that the party intends to offer into evidence at trial. The scope and manner of proceeding by means of requests for admission and the use thereof shall otherwise be governed by C.R.C.P. 36.

(F) In determining good cause to modify the limitations of this subsection (b)(2), the court shall consider the following:

(i) Whether the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

ii) Whether the party seeking discovery has had ample opportunity by disclosure or discovery in the action to obtain the information sought;

(iii) Whether the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues in the litigation, and the importance of the proposed discovery in resolving the issues; and

(iv) Whether because of the number of parties and their alignment with respect to the underlying claims and defenses, the proposed discovery is reasonable.

[Subsections (E)(i)-(iv) are moved to new paragraph (F).]

(3) Trial Preparation: Materials. Subject to the provisions of subsection (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:

(A) A written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. Except to the extent otherwise stipulated by the parties or ordered by the court, no discovery, including depositions, concerning either the identity or the opinion of experts shall be conducted until after the disclosures required by subsection (a)(2) of this Rule.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided by C.R.C.P. 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subsection (b)(4); and (ii) with respect to discovery obtained pursuant to subsection (b)(4)(B) of this Rule, the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information required to be disclosed or provided in discovery by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall

describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

[This subsection has been moved from section (a)(6) and amended.]

(c) Protective Orders. Upon motion by a party or by the person from whom disclosure is due or discovery is sought, accompanied by a certificate that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized by these Rules, by order, or by agreement of the parties, a party may not seek discovery from any source before submission of the proposed Case Management Order pursuant to C.R.C.P. 16. Any discovery conducted prior to issuance of the Case Management Order shall not exceed the limitations established by C.R.C.P. 26(b)(2). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party is under a duty to supplement its disclosures under section (a) of this Rule when the party learns that in some material respect the information disclosed is incomplete or

incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the disclosure or discovery process. A party is under a duty to amend a prior response to an interrogatory, request for production or request for admission when the party learns that the prior response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process. With respect to experts, the duty to supplement or correct extends both to information contained in the expert's report or summary disclosed pursuant to section (b) of this Rule and to information provided through any deposition of or interrogatory responses by the expert. Supplementation shall be performed in a timely manner.

(f) [No Colorado Rule -- See C.R.C.P. 16.]

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subsections (a)(1) or (a)(2) of this Rule shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, or response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification

that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the request, response or objection is:

(A) Consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) Not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(3) If without substantial justification a certification is made in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

COMMITTEE COMMENT

SCOPE

Because of its timing and interrelationship with C.R.C.P. 16, C.R.C.P. 26 does not apply to domestic relations, mental health, water law, forcible entry and detainer, C.R.C.P. 120, or other expedited proceedings. However, the Court in those proceedings may use C.R.C.P. 26 and C.R.C.P. 16 to the extent helpful to the case. In most instances, only the timing will need to be modified.

COLORADO DIFFERENCES

Revised C.R.C.P. 26 is patterned largely after Fed.R.Civ.P. 26 as amended in 1993 and 2000 and uses substantially the same numbering. There are differences, however. The differences are to fit disclosure/discovery requirements of Colorado's case/trial management system set forth in C.R.C.P. 16, which is very different from its Federal Rule counterpart. The interrelationship between C.R.C.P. 26 and C.R.C.P. 16 is described in the Committee Comment to C.R.C.P. 16.

The Colorado differences from the Fed.R.Civ.P. are: (1)timing and scope of mandatory automatic disclosures is different (C.R.C.P. 16(b)); (2)the two types of experts in the Federal Rule are clarified by the State Rule (C.R.C.P. 26(a)(2)(B)), and disclosure of expert opinions is made at a more realistic time in the proceedings (C.R.C.P. 26(a)(2)(C)); (3)sequenced disclosure of expert opinions is prescribed in C.R.C.P. 26(a)(2)(C) to avoid proliferation of experts and related expenses; (4)the parties may use a summary of an expert's testimony in lieu of a report prepared by the expert to reduce expenses (C.R.C.P. 26(a)(2)(B));

(5)claiming privilege/protection of work product (C.R.C.P. 26(b)(5)) and supplementation/correction provisions (C.R.C.P. 26(e)) are relocated in the State Rules to clarify that they apply to both disclosures and discovery; (6)a Motion for Protective Order stays a deposition under the State Rules (C.R.C.P. 121 § 1-12) but not the Federal Rule (Fed.R.Civ.P. 26(c)); (7)presumptive limitations on discovery as contemplated by C.R.C.P. 16(b)(1)(VI) are built into the rule (see C.R.C.P. 26(b)(2)); (8)counsel must certify that they have informed their clients of the expense of the discovery they schedule (C.R.C.P. 16(b)(1)(IV)); (9)the parties cannot stipulate out of the C.R.C.P. 26(b)(2) presumptive discovery limitations (C.R.C.P. 29); and (10)pretrial endorsements governed by Fed.R.Civ.P. 26(a)(3) are part of Colorado's trial management system established by C.R.C.P. 16(c) and C.R.C.P. 16(d).

As with the Federal Rule, the extent of disclosure is dependent upon the specificity of disputed facts in the opposing party's pleading (facilitated by the requirement in C.R.C.P. 16(b) that lead counsel confer about the nature and basis of the claims and defenses before making the required disclosures). If a party expects full disclosure, that party needs to set forth the nature of the claim or defense with reasonable specificity. Specificity is not inconsistent with the requirement in C.R.C.P. 8 for a "short, plain statement" of a party's claims or defenses. Obviously, to the extent there is disclosure, discovery is unnecessary. Discovery is limited under this system.

FEDERAL COMMITTEE NOTES

Federal "Committee Notes" to the December 1, 1993 and December 1, 2000 amendments of Fed.R.Civ.P. 26 are

incorporated by reference and where applicable should be used for interpretive guidance.

The most dramatic change in C.R.C.P. 26 is the addition of a disclosure system. Parties are required to disclose specified information without awaiting a discovery demand. Such disclosure is, however, tied to the nature and basis of the claims and defenses of the case as set forth in the parties' pleadings facilitated by the requirement that lead counsel confer about such matters before making the required disclosures.

Subparagraphs (a)(1)(A) and (a)(1)(B) of C.R.C.P. 26 require disclosure of persons, documents and things likely to provide discoverable information relative to disputed facts alleged with particularity in the pleadings. Disclosure relates to disputed facts, not admitted facts. The reference to particularity in the pleadings (coupled with the requirement that lead counsel confer) responds to the concern that notice pleading suggests a scope of disclosure out of proportion to any real need or use. To the contrary, the greater the specificity and clarity of the pleadings facilitated by communication through the C.R.C.P. 16(b) conference, the more complete and focused should be the listing of witnesses, documents, and things so that the parties can tailor the scope of disclosure to the actual needs of the case.

It should also be noted that two types of experts are contemplated by Fed.R.Civ.P. and C.R.C.P. 26(a)(2). The experts contemplated in subsection (a)(2)(B)(II) are persons such as treating physicians, police officers, or others who may testify as expert witnesses and whose opinions are formed as a part of their occupational duties (except when the person is an employee of the party cailing the witness). This more limited disclosure has been incorporated into the State Rule

because it was deemed inappropriate and unduly burdensome to require all of the information required by C.R.C.P. 26(a)(2)(B)(I) for C.R.C.P. 26(a)(2)(B)(H) type experts.

2001 COLORADO CHANGES

The change to C.R.C.P. 26(a)(2)(C)(II) effective July 1, 2001, is intended to prevent a plaintiff, who may have had a year or more to prepare his or her case, from filing an expert report early in the case in order to force a defendant to prepare a virtually immediate response. That change clarifies that the defendant's expert report will not be due until 90 days prior to trial.

The change to C.R.C.P. 26(b)(2)(A) effective July 1, 2001 was made to clarify that the number of depositions limitation does not apply to persons expected to give expert testimony disclosed pursuant to subsection 26(a)(2).

The special and limited form of request for admission in C.R.C.P. 26(b)(2)(E) effective July 1, 2001, allows a party to seek admissions as to authenticity of documents to be offered at trial without having to wait until preparation of the Trial Management Order to discover whether the opponent challenges the foundation of certain documents. Thus, a party can be prepared to call witnesses to authenticate documents if the other party refuses to admit their authenticity.

The amendment of C.R.C.P. 26(b)(1) effective January 1, 2002 is patterned after the December, 2000 amendment of the corresponding Federal rule. The amendment should not prevent a party from conducting discovery to seek impeachment evidence or evidence concerning prior acts.

Rule 30. Depositions Upon Oral Examination.

(a) When Depositions May Be Taken. (1) Subject to the provisions of C.R.C.P. Rules 26(b)(2)(A) and 26(d), a party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2) of this section. The attendance of witnesses may be compelled by subpoena as provided in C.R.C.P. 45.

(2) Leave of court must be obtained pursuant to C.R.C.P. Rules 16(b)(1) and 26(b) if:

(A) A proposed deposition, if taken, would result in more depositions than set forth in the Case Management Order;

(B) The person to be examined already has been deposed in the case;

(C) A party seeks to take a deposition before the time specified in C.R.C.P. 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the state and be unavailable for examination within the state if the person's deposition is not taken before the expiration of such time period; or

(D) The person to be examined is confined in prison.

(b) Notice of Examination: General Requirements; Method of Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.

(1) Consistent with C.R.C.P. 121, sec. 1-12, a party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every

other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded, which, unless the court otherwise orders, may be by sound, sound-and-visual, or stenographic means. Unless the court otherwise orders, the party taking the deposition shall bear the cost of the recording.

(3) Any party may provide for a transcription to be made from the recording of a deposition taken by non-stenographic means. With reasonable prior notice to the deponent and other parties, any party may designate another method of recording the testimony of the deponent in addition to the method specified by the person taking the deposition. Unless the court otherwise orders, each party designating an additional method of recording the testimony of a deponent shall bear the cost thereof.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated pursuant to C.R.C.P. 28 and shall begin with a statement on the record by the officer that includes (a) the officer's name and business address; (b) the date, time, and place of the deposition; (c) the name of the deponent; (d) the administration of the oath or affirmation to the deponent; and (e) an identification of all persons present. If the deposition

is recorded other than stenographically, items (a) through (c) shall be repeated at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted by the use of camera or sound-recording techniques. At the conclusion of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording, the exhibits, or other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and C.R.C.P. Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by telephone or other remote electronic

means is taken at the place where the deponent is to answer questions propounded to the deponent. The stipulation or order shall include the manner of recording the proceeding.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Colorado Rules of Evidence except CRE 103. The witness shall be put under oath or affirmation and the officer before whom the deposition is to be taken shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subsection (b)(2) of this Rule.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or in any other respect to the proceedings shall be noted by the officer upon the record of the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Schedule and Duration; Motion to Terminate or Limit Examination. (1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. An instruction not to answer may be made during a deposition only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion pursuant to subsection (d)(3) of this Rule.

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. By order, the court may limit the time permitted for the conduct of a deposition to less than seven hours, or may allow additional time if needed for a fair examination of the deponent and consistent with C.R.C.P. 26(b)(2), or if the deponent or another person impedes or delays the examination, or if other circumstances warrant. If the court finds such an impediment, delay, or other conduct that frustrates the fair examination of the deponent, it may impose upon the person responsible therefor an appropriate sanction, including the reasonable costs and attorney fees incurred by any parties as a result thereof.

(3) At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in C.R.C.P. 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of C.R.C.P. 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Review by Witness; Changes; Signing. If requested by the deponent or a party before completion of the deposition, the deponent shall be notified by the officer that the transcript or recording is available. Within 30 days of receipt of such

notification the deponent shall review the transcript or recording and, if the deponent makes changes in the form or substance of the deposition, shall sign a statement reciting such changes and the deponent's reasons for making them and send such statement to the officer. The officer shall indicate in the certificate prescribed by subsection (f)(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent.

(f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify that the witness was duly sworn and that the deposition is a true record of the testimony given by the witness. This certificate shall be set forth in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "deposition of (here insert name of witness)" and shall promptly transmit it to the attorney who arranged for the transcript or recording. The receiving attorney shall store the deposition under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition and may be inspected and copied by any party, except that: if the person producing the materials desires to retain the originals, the person may

(A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or

(B) offer the originals to be marked for identification, after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(g) Failure to Attend or to Serve Subpoena; Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

COMMITTEE COMMENT

Revised C.R.C.P. 30 is patterned in part after Fed.R.Civ.P. 30 as amended in 1993 and now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of depositions and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

Language in C.R.C.P. 30(c) and C.R.C.P. 30(f)(1) differs slightly from the language of Fed.R.Civ.P. 30(c) and Fed.R.Civ.P. 30(f)(1) to facilitate the taking of telephone depositions by eliminating the requirement that the officer recording the deposition be the person who administers the oath or affirmation.

Rule 33. Interrogatories to Parties.

(a) Availability. Any party may serve upon any other party written interrogatories, not exceeding the number, including all discrete subparts, set forth in the Case Management Order, to be answered by the party served or, if the party served is a public or private corporation, or a partnership, or association, or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave of court must be obtained, consistent with the principles stated in C.R.C.P. Rules 16(b)(1) and 26(b) and subsection (e) of this Rule, to serve more interrogatories than the number set forth in the Case Management Order. Without leave of court or written stipulation, interrogatories may not be served before the time specified in C.R.C.P. 26(d).

(b) Answers and Objections. (1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties pursuant to C.R.C.P. 29.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely

objection will be deemed to be waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to answer an interrogatory.

(c) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into pursuant to C.R.C.P. 26(b), and the answers may be used to the extent permitted by the Colorado Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served, or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries.

(e) Pattern and Non-Pattern Interrogatories; Limitations. The pattern interrogatories set forth in the Appendix to Chapter 4, Form 20, are approved. Any pattern interrogatory and its subparts shall be counted as one interrogatory. Any subpart to a non-pattern interrogatory shall be considered as a separate interrogatory.

COMMITTEE COMMENT

Revised C.R.C.P. 33 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of interrogatories and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

Rule 34. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes.

(a) Scope. Subject to the limitations contained in the Case Management Order, a party may serve on any other party a request:

(1) To produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of C.R.C.P. 26(b) and which are in the possession, custody, or control of the party upon whom the request is served; or

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of C.R.C.P. 26(b).

(b) Procedure. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the

request. A shorter or longer time may be directed by the court or agreed to in writing by the parties pursuant to C.R.C.P. 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order pursuant to C.R.C.P. 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

COMMITTEE COMMENT

Revised C.R.C.P. 34 now interrelates with the differential case management features of C.R.C.P. 16 and C.R.C.P. 26. Because of mandatory disclosure, substantially less discovery is needed.

A discovery schedule for the case is required by C.R.C.P. 16(b)(1)(IV). Under the requirements of that Rule, the parties must set forth in the Case Management Order the timing and number of requests for production and the basis for the necessity of such discovery with attention to the presumptive limitation and standards set forth in C.R.C.P. 26(b)(2). There is also the requirement that counsel certify they have advised

their clients of the estimated expenses and fees involved in the discovery. Discovery is thus tailored to the particular case. The parties in the first instance and ultimately the Court are responsible for setting reasonable limits and preventing abuse.

APPENDIX I

COLORADO RULES OF EVIDENCE

Rule 404. Character Evidence Not Admissible to Prove Conduct.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same or if evidence of the alleged victim's character for aggressiveness or violence is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness as provided in Rules 607, 608, and 13-90-101.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(Federal Rule Identical.)

COMMITTEE COMMENT

See also § 16-10-301, C.R.S. (Volume 8, 1978 Repl. Vol.), adopted by 1975 Legislature, setting for statute on standards and methods of proof relating to evidence of similar transactions in cases involving charges of unlawful sexual behavior.

Rule 607. Who May Impeach.

The credibility of a witness may be attacked by any party, including the party calling him. Leading questions may be used for the purpose of attacking such credibility.

COMMITTEE COMMENT

This rule abandons the traditional position against impeaching one's own witness. The additional sentence in the Colorado version of the rule should assist in resolving conflicts now existing between Rule 43(b) of the Colorado Rules of Civil Procedure and § 13-90-116, C.R.S. A minority opinion concerning Rule 607 feels that this rule should be restricted to civil cases since it may be prosecutorial misconduct for a prosecutor to attack the credibility of his own witness without a showing of hostility or surprise. The likelihood of a defendant's being found guilty because of a "coparticipant" hesitation to testify against the defendant may prejudice the jury to such an extent that a fair trial cannot be obtained

Rule 608. Evidence of Character and Conduct of Witness.

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in 13-90-101, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

(Federal Rule Identical.)

Rule 701. Opinion Testimony by Lay Witnesses.

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

(Federal Rule Identical.)

COMMITTEE COMMENT

This rule does not foreclose an owner from giving an opinion as to the value of his real property. Universal Insurance Company v. Arrigo, 96 Colo. 531, 44 P.2d 1020 (1935).

Rule 702. Testimony by Experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703. Bases of Opinion Testimony by Experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

(Federal Rule Identical.)

COMMITTEE COMMENT

The Committee believes this rule is a substantial deviation from former Colorado law, but there are former cases lending partial support to the rule. See: Hensel Phelps Construction Co. v. U.S., 413 F.2d 701 10th Cir. (1969); Houser v. Eckhardt, 168 Colo. 226, 450 P.2d 664 (1969); McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962); Ison v. Stewart, 105 Colo. 55, 94 P.2d 701 (1939); Enyart v. Orr, 78 Colo. 6, 238 P. 29 (1925); Rio Grande W. Ry. Co. v. Rubenstein, 5 Colo. App. 121, 38 P. 76 (1894). See also, Good v. A.B. Chance Co., 39 Colo. App. 70, 565 P.2d 217 (1977). Although not directly in point, we believe the case supports the last sentence of Rule 703. (Amended March 5, 1981, effective July 1, 1981.)

Rule 704. Opinion on Ultimate Issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(Federal Rule Identical.)

COMMITTEE COMMENT

The present Federal and Colorado rules may conflict with preceding Colorado case law. (Compare Bridges v. Lintz, 140 Colo. 582, 346 P.2d 571 (1959) and McNelley v. Smith, 149 Colo. 177, 368 P.2d 555 (1962).) It is felt that the rule expresses the better alternative. The conflict arises in the area of lay witnesses testifying as to an ultimate issue of fact. In Colorado, case law says that he may testify concerning things which would "help" the jury to understand the facts, but he may not render an opinion on the ultimate fact in issue. Mogote-Northeastern Consolidated Ditch Co. v. Gallegos, 70 Colo. 550, 203 P. 668 (1922). There are exceptions to the rule, and the law in Colorado can best be stated by quoting the following language: "It is reversible error to allow an opinion as to ultimate facts unless the witness testifies as an expert or his testimony invokes a description or estimate of condition, value, etc. or when it is difficult or impossible to state with sufficient exactness the facts and their surroundings." Town of Meeker v. Fairfield, 25 Colo. App. 187, 136 P. 471 (1913).

Rule 705. Disclosure of Facts.

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

(Federal Rule Identical.)

COMMITTEE COMMENT

Although the present rule is contrary to Colorado case law, the Committee believes it to be the better view. The reasons for the retention of the proposed Federal rule as it is presently written are as follows. First, the rule does not disturb the requirement for a proper foundation for expert opinions. City and County of Denver v. Lyttle, 106 Colo. 157, 103 P.2d 1 (1940). Secondly, the elimination of the requirement for preliminary disclosure of underlying facts or data has the effect of reducing the need for hypothetical questions, a goal which has been sought by a number of states. Thirdly: "If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundations requirement." Advisory Committee's Notes, Proposed Federal Rules. See also, *Archina v. People*, 135 Colo. 8, 307 P.2d 1083 (1957). Finally, it is clear that there is built-in safeguard in the discretionary power of the court to require prior disclosure.

Rule 706. Court Appointed Experts.

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.